

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT - 9 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BARBARA PORTILLO,

Plaintiff,

v.

No. 97-CV-282B

NATIONAL AMERICAN INSURANCE
COMPANY,

Defendant.


ENTERED ON DOCKET

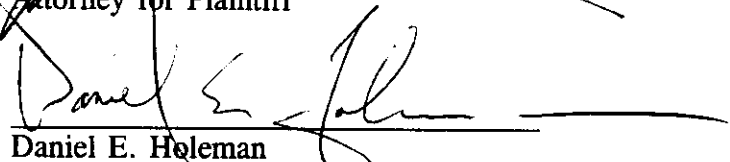
DATE OCT 10 1997

STIPULATION FOR ORDER OF DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, her attorney of record, and Defendant's counsel, and would show the Court that this matter has been compromised and settled and, therefore, moves the Court for an Order Of Dismissal With Prejudice.


Barbara Portillo


Jeffrey Parker
Attorney for Plaintiff


Daniel E. Holeman
Attorney for Defendant

382-152/stip.mc

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
OCT 3 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

HOMEWARD BOUND, INC.,
et al.,

Plaintiffs,

vs.

HISSOM MEMORIAL CENTER,
et al.,

Defendants.

Case No. 85-C-437-E

ENTERED ON DOCKET

OCT 10 1997

ORDER AND JUDGMENT

DATE _____

Plaintiffs' counsel, Bullock & Bullock, filed an Attorney Fee Application on August 11, 1997, for an award of attorney fees and expenses in accordance with the December 23, 1989 order and stipulation of the parties.

The Court has reviewed the application for fees and the Stipulation of the parties.


The Court hereby awards the firm Bullock & Bullock uncontested attorney fees and expenses in the amount of \$37,866.28.

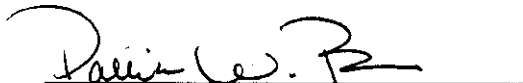
IT IS THEREFORE ORDERED that the Department of Human Services, the Oklahoma Health Care Authority and the Department of Rehabilitation Services are each jointly and severally liable for the payment to plaintiffs' counsel, Bullock & Bullock, for attorney fees and expenses in the amount of \$37,866.28, and a judgment in the amount of \$37,866.28 is hereby granted on this day.


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A hearing on the contested time and expenses will be scheduled at a later date upon application of the parties.

ORDERED this 3RD day of October, 1997.


HONORABLE JAMES O. ELLISON
United States District Court

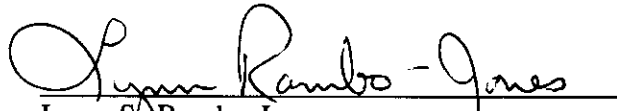

Louis W. Bullock
Patricia W. Bullock
BULLOCK & BULLOCK
320 South Boston, Suite 718
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(918) 584-2001


Mark Lawton Jones
Assistant Attorney General
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GENERAL
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- and -

Frank Laski
Judith Gran
PUBLIC INTEREST LAW CENTER
OF PHILADELPHIA
125 South Ninth Street, Suite 700
Philadelphia, PA 19107
(215) 627-7100

ATTORNEYS FOR PLAINTIFFS


Lynn S. Rambo-Jones
Deputy General Counsel
OKLAHOMA HEALTH CARE
AUTHORITY
4545 North Lincoln, Suite 124
Oklahoma City, OK 73105
(405) 530-3439

ATTORNEY FOR DEFENDANTS

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT - 9 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JEFF MARTIN,

Plaintiff,

vs.

THE WILLIAMS COMPANIES, INC.,
and BILL VON GLAHN,

Defendants.

Case No. 97 CV 0157 K

ENTERED ON DOCKET

DATE 10-10-97

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, Jeff Martin ("Plaintiff"), and Defendants, The Williams Companies, Inc. and Bill von Glahn ("Defendants"), jointly stipulate that all claims herein should be dismissed with prejudice with each party to bear its own costs and attorneys' fees.

DATED this 9th day of October, 1997.

Respectfully submitted,

MALLOY & MALLOY, INC.


By: [Signature]

Patrick J. Malloy, III, OBA #5647
1924 South Utica, Suite 810
Tulsa, Oklahoma 74104-6515
(918) 747-3491

TRUSTEE FOR JEFFREY ALLEN MARTIN
BANKRUPTCY NO. 97-01652-R

- AND -

HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.

By: 
J. Patrick Cremin, OBA #2013
Leslie C. Rinn, OBA #12160
320 South Boston Avenue, Suite 400
Tulsa, Oklahoma 74103-3708
(918) 594-0594

ATTORNEYS FOR DEFENDANTS
THE WILLIAMS COMPANIES, INC. and
BILL VON GLAHN

DATE 10-10-97

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 10 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

American Capital Corporation, a California
corporation)

Plaintiff,)

vs.)

Lentz Family Farms, Inc. an Oklahoma
corporation, and Tommy G. Lentz, an
individual)

Defendants.)

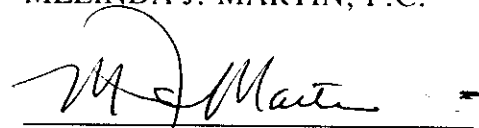
Case No. 97CV-0636K (M)

STIPULATION AND DISMISSAL WITH PREJUDICE

Plaintiff, American Capital Corporation, ("ACC"), by and through its attorney of record, and pursuant to Fed. R. Civ. P. 41(a)(1) enters this stipulation to the dismissal of, and does hereby dismiss the above-captioned action with prejudice, each party to bear its own costs and attorneys' fees.

Respectfully submitted,

MELINDA J. MARTIN, P.C.



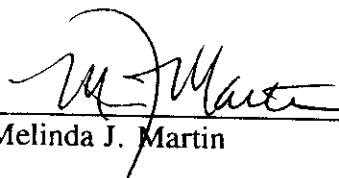
Melinda J. Martin, OBA #5737.
15 West 6th Street, Suite 1604
Tulsa, Oklahoma 74119
(918) 584-1880

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c15

CERTIFICATE OF SERVICE

This is to certify that on this 10th day of October 1997, I caused a true and correct copy of the foregoing document to be placed in the United States mail, postage prepaid, to:

James C. Linger, OBA #5441
Gene P. Dennison, OBA #2308
1710 South Boston Avenue
Tulsa, Oklahoma 74119-4810



Melinda J. Martin

ENTERED ON DOCKET

DATE 10-10-97

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 10 1997

UNITED STATES OF AMERICA,

Plaintiff

v.

DONNA L. COX,

Defendant.

)
)
)
)
)
)
)
)
)
)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Civil Action No. 97CV 204K

CLERK'S ENTRY OF DEFAULT

It appearing from the files and records of this Court as of October 10, 1997 and the declaration of Loretta F. Radford, Assistant United States Attorney, that the Defendant, **Donna L. Cox**, against whom judgment for affirmative relief is sought in this action has failed to plead or otherwise defend as provided by the Federal Rules of Civil Procedure; now, therefore,

I, PHIL LOMBARDI, Clerk of said Court, pursuant to the requirements of Rule 55(a) of said rules, do hereby enter the default of said defendant.

Dated at Tulsa, Oklahoma, this 10th day of October, 1997.

PHIL LOMBARDI, Clerk
United States District Court for
the Northern District of Oklahoma

By S. Schwebke
Deputy Court Clerk for Phil Lombardi

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 8 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARCUS FORD,

Plaintiff,

vs.

RON CHAMPION, et al.,

Defendants.

Case No.96-C-015-C

ENTERED ON DOCKET

DATE OCT 8 1997

JUDGMENT

Judgment is hereby entered for Defendants and against Plaintiff. Dated this

8th day of October, 1997.


H. DALE COOK
U.S. DISTRICT COURT SENIOR JUDGE

FILED

OCT 8 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA**

MARCUS FORD,

Plaintiff,

vs.

RON CHAMPION, et al.,

Defendants.

Case No.96-C-015-C ✓

ENTERED ON DOCKET
DATE OCT 9 1997

ORDER

There being no objection, the Court adopts the Magistrate Judge's Report and Recommendation filed September 16, 1997 [Dkt. 20]. **THE COURT ORDERS THAT THIS CASE BE DISMISSED** as outlined in the Magistrate Judge's Report and Recommendation.

SO ORDERED this 8 day of October, 1997.


H. DALE COOK

U.S. DISTRICT COURT SENIOR JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 9 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOBETE MUSIC CO., INC.,
BROCKMAN ENTERPRISES, INC.,
and HAMSTEIN MUSIC COMPANY,

Plaintiffs,

vs.

SHOTS, INC.,

Defendant.

Case No. 97-CV-215-BU

ENTERED ON DOCKET

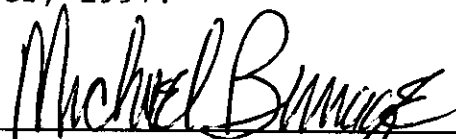
DATE 10-9-97

ORDER

Upon the unopposed Application of the plaintiffs for an Order of Dismissal, and after review of the Stipulation of Settlement on file herein, the Court finds that the plaintiffs' Application should be, and hereby is, granted.

IT IS ORDERED that this action is dismissed without prejudice. The Court retains complete jurisdiction to vacate this Order upon cause shown, on or before February 1, 1998, that the Stipulation of Settlement has not been performed and further litigation is necessary. If on or before February 1, 1998, the parties have not applied to reopen this litigation for the purpose of obtaining such a final determination, this action will be deemed dismissed with prejudice.

ENTERED this 8th day of October, 1997.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT - 8 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MICHAEL D. MACK,

Petitioner,

v.

RON CHAMPION, et al.,

Respondent.

No. 95-C-356-B(J)

ENTERED ON DOCKET

REPORT AND RECOMMENDATION DATE OCT 09 1997

Petitioner, Michael D. Mack, filed his current Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 on April 21, 1995. In the brief most recently filed by Respondent [Doc. No. 18-1], Respondent notes that, upon reviewing Petitioner's allegations in Petitioner's Reply Brief [Doc. No. 15-1], Petitioner was not "in custody" for the purpose of federal habeas corpus review with respect to the convictions that Petitioner is challenging. On August 22, 1997, this Court sent a "Questionnaire" to Petitioner [Doc. No. 19-1] and directed Petitioner to answer the questions in the questionnaire within thirty days. As of the date of this Order, Petitioner has failed to respond to the questionnaire. Upon review of the materials attached to Respondent's Brief [Doc. No. 18-1], in addition to the materials attached by Petitioner to his Petition and to his Reply [Doc. Nos. 3-1, 4-1, 15-1], the undersigned Magistrate Judge recommends that Petitioner's Petition for a Writ of Habeas Corpus be **DISMISSED** without prejudice for failure to properly exhaust state remedies.

I. PROCEDURAL HISTORY

In his Petition for a Writ of Habeas Corpus, Petitioner did not complete the Form which is provided by the Court to Petitioner to initiate a habeas corpus proceeding. [Doc. No. 1-1]. Petitioner elected to file a separate brief alleging his errors. Petitioner asserted the following errors: (1) double jeopardy, (2) denial of sixth and fourteenth amendment constitutional rights due to failure of counsel to suppress or challenge the admission of his prior conviction, (3) ineffective assistance of counsel, and (4) failure of counsel to advise Petitioner of the effect of his prior guilty plea.

On June 16, 1995, Respondents filed a Motion to Dismiss Petitioner's Petition claiming that Petitioner had failed to exhaust his state remedies. Respondent noted that Petitioner was "apparently attacking his convictions in CRF-78-3188, CRF-79-1749, and CRF-86-992," and that although Petitioner had presented some issues to the Oklahoma Court of Criminal Appeals with respect to these three convictions, Petitioner had failed to present all issues to the state court which he currently urged before this Court. Respondent therefore requested that Petitioner's Petition be dismissed due to his failure to exhaust his state court remedies.

The Magistrate Judge agreed with the Respondent that Petitioner seemed to be attacking his convictions in Case Nos. CRF-78-3188, CRF-79-1749, and CRF 86-992. However, the Magistrate Judge noted that Petitioner had appealed some issues to the Oklahoma Court of Criminal Appeals^{1/}, and the Magistrate Judge concluded, based on

1/ On September 15, 1994, Petitioner filed three Applications to Vacate Judgment
(continued...)

the information provided by the parties, that requiring Petitioner to present additional issues to the Oklahoma Court of Criminal Appeals on the same appeal would be "futile." See, e.g., Duckworth v. Serrano, 454 U.S. 1, 3 (1981). The Magistrate Judge therefore recommended [Doc. No. 9-1] that the Court find that the Petitioner's remaining issues had been procedurally defaulted, that Respondent's Motion to Dismiss be denied, and that Petitioner be ordered to explain (on the procedurally defaulted issues) how he met the cause and prejudice standard. The Report and Recommendation was adopted by the District Judge on April 26, 1996.

Petitioner filed a supplemental brief on June 5, 1996, attempting to address the "cause and prejudice" issues. The supplemental brief did not fully comply with the court's order, and Petitioner was again instructed, by Order dated November 27, 1996, to file a brief detailing how the issues he raised in his Petition met the cause and prejudice standard. Petitioner filed a "second" supplemental brief on December 27, 1996. Respondent filed a Reply Brief on January 27, 1997.

1/ (...continued)

and Sentence in the Tulsa County District Court. Petitioner requested that the court vacate the judgments and sentences of May 4, 1979 (Case No. CRF 78-3188), March 14, 1983 (Case No. CRF 79-1749), and May 27, 1986 (Case No. CRF 78-1388), asserting that the trial court failed to advise Petitioner of his right to appeal or of his right to withdraw his guilty plea. By Order dated November 1, 1994, the Tulsa County District Court denied Petitioner's Applications.

Petitioner filed a Notice of Intent to Appeal the decision of the Tulsa County District Court on November 9, 1994. In his Petition of Error before the Oklahoma Court of Criminal Appeals, filed December 7, 1994, Petitioner alleged that the district court erred by failing to advise him of his right to counsel (for his direct appeal) or of his right to appeal. Petitioner's application for post-conviction relief was denied by the Oklahoma Court of Criminal Appeals on January 5, 1995 due to Petitioner's failure to timely appeal the decision of the district court.

In the Reply Brief, Respondent argues, for the first time, that Petitioner is not "in custody" for the purpose of federal habeas corpus review. The Magistrate Judge has thoroughly reviewed the attachments filed by Respondent and the numerous attachments filed by Petitioner.

II. PETITIONER'S PRIOR AND CURRENT CONVICTIONS

In Case No. 78-CRF-3188, Petitioner was charged with "Larceny of Merchandise from a Retailer." Petitioner pled guilty and was sentenced to eighteen months (suspended sentence).

In Case No. 79-1749, Petitioner was charged with "Robbery with Firearm after Conviction of a Felony." On December 12, 1979, Petitioner was sentenced to sixty years. Petitioner filed a direct appeal which was reversed, following appeal, by the U.S. Supreme Court. On resentencing, Petitioner pled guilty and was sentenced to seven years.

In Case No. 86-CRF-992, Petitioner was charged with "Unlawful Possession of a Stolen Vehicle." On May 27, 1986, Petitioner pled guilty and was sentenced to five years.

Respondent, in the attachments to Respondent's Reply Brief notes that Petitioner has already served these sentences. Petitioner discharged his sentence in 78-CRF-3188 on April 23, 1980. Petitioner's beginning release date in Case No. 79-CRF-1749 is indicated as March 24, 1990.^{2/} Petitioner discharged this sentence on

2/ Respondent notes that Petitioner's release date for this conviction was January 14,
(continued...)

May 18, 1984. Petitioner discharged his sentence in 86-CRF-992 on February 17, 1988.

Therefore, Petitioner appears to be challenging convictions on three charges. However, Petitioner has completely served the time on each of those three charges.

On December 14, 1988, in Case No. 88-CF-2365, Petitioner was sentenced, following a jury trial, to 55 years. Petitioner appealed this sentence to the Oklahoma Court of Criminal Appeals. Petitioner alleged that: (1) the court refused to give a jury instruction on exculpatory statements, (2) the court erred in giving a jury instruction on flight, and (3) the court failed to properly instruct on the burden of proof. The Oklahoma Court of Criminal Appeals reversed the trial court. On remand, Petitioner was sentenced on October 12, 1992, to 20 years. The record indicates that Petitioner did not appeal this decision.

In Case No. 93-CF-554, Petitioner was charged with possession of contraband while an inmate after prior conviction of three felonies. Petitioner pled guilty and on July 14, 1994 was sentenced to twenty years, to run concurrently with his prior sentence. Petitioner did not attempt to withdraw his guilty plea or otherwise appeal his sentence.

2/ (...continued)

1983. Petitioner's sixty year sentence on this charge was vacated by the Oklahoma Court of Criminal Appeals after Petitioner appealed. The sentence was "discharged" pursuant to the Mandate of the Oklahoma Court of Criminal Appeals on January 14, 1983. At resentencing (on March 14, 1983), Petitioner pled guilty and was sentenced to a term of seven years. On March 24, 1983, Petitioner was given credit for having served four years, seven months and eleven days on his sentence. The records indicate that he was discharged on May 18, 1984.

In Case No. 93-CF-776, Petitioner was charged with escape from a penal institution after the conviction of four felonies. Petitioner pled guilty and on July 14, 1994 was sentenced to twenty years, to run concurrently with his two prior sentences. Petitioner did not attempt to withdraw his guilty plea or otherwise appeal his sentence.

The record indicates that Petitioner is currently serving three twenty year sentences which are to run concurrently. Petitioner did not appeal any of the sentences which he is currently serving to the Oklahoma Court of Criminal Appeals.^{3/}

III. ANALYSIS

The "In Custody" Requirement

In his initial Petition for a Writ of Habeas Corpus, and Brief in Support, the only convictions referenced by Petitioner were the convictions he received in: CRF-78-3188, CRF-79-1749, and CRF 86-992. As noted by Respondent in his Response Brief [Doc. No. 18-1], and as detailed in the attachments to Respondent's Brief, Petitioner has already served the time imposed by the State of Oklahoma for the convictions in these three cases. Pursuant to the "in custody" requirement of § 2254, Petitioner must be serving time on a sentence to successfully challenge that sentence. See, e.g., Maleng v. Cook, 490 U.S. 488 (1989).

3/ Petitioner did initially appeal his sentence in 88-CF-2365. The Oklahoma Court of Criminal Appeals reversed the sentence, however, and Petitioner was resentenced by the trial court. Petitioner did not appeal following his resentencing.

A limited exception to this requirement was noted by the Tenth Circuit Court of Appeals in Gamble v. Parsons, 898 F.2d 117 (10th Cir. 1990). As Gamble explains, a Petitioner can challenge a present conviction which was enhanced based on a prior conviction.

As we read Maleng, it precludes a defendant from challenging a fully-expired conviction in isolation even though it may have potential collateral consequences in some future case. Further, even if the fully-expired conviction has, in fact, been used to enhance a subsequent sentence, it may not be attacked directly in a habeas action. Rather, the attack must be directed toward the enhanced sentence under which the defendant is in custody. However, if the attack is so directed, the defendant may argue that his present sentence is improper because it has been enhanced by a prior, unconstitutional conviction.

Gamble, 898 F.2d 117, 118.

The Court provided an opportunity to Petitioner to specify which conviction(s) he was challenging in the "Questionnaire" which was sent to Petitioner. However, Petitioner has declined to respond to the Questionnaire.

If Petitioner is attempting to challenge his three prior convictions, Petitioner has exhausted those claims for the purpose of habeas corpus review. See Report & Recommendation dated March 13, 1996, [Doc. No. 9-1]. However, Petitioner is prohibited from challenging those three prior convictions because Petitioner has already served the sentences related to those convictions and is therefore no longer "in custody" for the purposes of a habeas corpus challenge. If exhaustion requirements are satisfied, Petitioner could, pursuant to Tenth Circuit authority, challenge his current convictions (on which he is "in custody"), and through those convictions argue that

his present sentence is improperly enhanced because a prior, unconstitutional conviction was used to enhance it.

Because Petitioner is a *pro se* prisoner, the Court could liberally construe his Petition as challenging the sentences he is currently serving. Petitioner is "in custody" for the purpose of habeas review with respect to these sentences. However, Petitioner did not appeal the resentencing on his conviction in 88-CF-2565, and Petitioner did not attempt to withdraw his guilty plea or file an appeal out of time with respect to his convictions in 93-CF-554 and 93-CF-776. Therefore, the Court concludes that if Petitioner's complaint is liberally construed to permit Petitioner to challenge the convictions that he is currently serving, Petitioner has failed to exhaust his state court remedies and his Petition should be dismissed.

Exhaustion

Federal courts are prohibited from granting applications for a writ of habeas corpus unless a petitioner meets the requirements of 28 U.S.C. § 2254(b) and (c). To satisfy these statutory requirements, a petitioner must show that either (a) the state's appellate court had an opportunity to rule on the same claim presented in federal court (exhaustion), or (b) the petitioner had no available means for pursuing a review of a conviction in state court at the time of the filing of the federal petition, or (c) circumstances exist that render such process ineffective to protect the rights of the applicant. 28 U.S.C. § 2254(b). See also White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988). The Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies

as to any of his federal claims." Coleman v. Thompson, 111 S. Ct. 2546, 2554-55 (1991).

To exhaust a claim, Petitioner must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). "[E]xhaustion of state remedies is not required where the state's highest court has recently decided the precise legal issue that petitioner seeks to raise on his federal habeas petition." Goodwin v. State of Oklahoma, 923 F.2d 156, 157 (10th Cir. 1991). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

Petitioner plead guilty with respect to two of the three charges upon which Petitioner is in custody. Petitioner appealed one of the three charges. Petitioner's appeal was reversed by the Oklahoma Court of Criminal Appeals, and Petitioner did not appeal after he was resentenced.

Petitioner's appeal time with respect to all three sentences that he is currently serving has expired. However, Oklahoma permits the filing of an "appeal out of time." In Lozoya v. State of Oklahoma, 932 P.2d 22 (Okla. Crim. App. 1997), the petitioner, after entering a plea of guilty, did not properly perfect his appeal or file an application to withdraw his guilty plea. The Oklahoma Court of Criminal Appeals granted an appeal out of time, and addressed the issues presented by the petitioner. Id. at 25.

The procedure for filing an "application out of time" was described in Smith v. State of Oklahoma, 611 P.2d 276 (Okla. Crim. App. 1980).

The prior statutory appeal out of time remedy found at 22 O.S. Supp 1965, § 1073 was repealed upon enactment of and has been subsumed within the Post Conviction Procedures Act, 22 O.S. 1971, § 1080 *et seq.*

. . . . [T]he proper procedure to secure the remedy is the filing of a post conviction application in the District Court, where Findings of Fact and Conclusions of Law should be made as to whether applicant was denied a direct appeal through no fault of his own, which issue is the crucial one to appeal out of time, followed by an application, or "appeal", as it were, filed in this Court, with the District Court findings and conclusions.

Id. at 276 (footnotes and citations omitted). The Oklahoma Court additionally footnotes,

In some instances it may be appropriate for the District Court to simply vacate the original judgment and sentence and impose a new judgment and sentence, so that the appeal time will begin to run anew.

Id. at 276 n.1. See also White v. Meachum, 838 F.2d 1137 (10th Cir. 1988).

Consequently, Petitioner has not yet "exhausted" his state court remedies. Petitioner should, therefore, return to state court and file a request to appeal out of time the convictions that he is challenging. Petitioner may still return to federal court after exhausting his state court remedies.

RECOMMENDATION

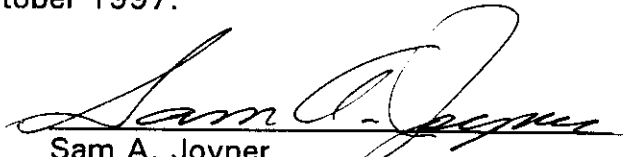
The United States Magistrate Judge recommends that the District Court **DISMISS** Petitioner's Petition for a Writ of Habeas Corpus due to Petitioner's failure

to Exhaust. Petitioner is attempting to challenge prior convictions which Petitioner has already served. Petitioner is not "in custody" with respect to those prior convictions and therefore cannot directly challenge such convictions. If Petitioner's Petition is construed as challenging the convictions which he is currently serving, however, Petitioner has not properly exhausted his state court remedies. The undersigned United States Magistrate Judge therefore recommends that the District Court **DISMISS** Petitioner's Petition for a Writ of Habeas Corpus **without prejudice**.

OBJECTIONS

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of the review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of the Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). The failure to file written objections to this Report and Recommendation may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are ultimately accepted or adopted by the District Court. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 8 day of October 1997.


Sam A. Joyner
United States Magistrate Judge

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy
of the foregoing pleading was served on each
of the parties hereto by mailing the same to
them or to their attorneys of record on the
9 Day of October, 1997.



IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
OCT 9 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

MAURICE SHERMAN BLISS, ET AL.,)
)
Plaintiffs,)
)
vs.)
)
CHARLES SCHUSTERMAN, ET AL.,)
)
Defendants.)

Case No. 96-CV-557-BU ✓

ENTERED ON DOCKET

DATE 10-9-97

ORDER

Currently pending before the Court are various motions of the parties. Upon review, the Court **ORDERS** as follows:

1. Defendants' Application for Leave to File Supplemental Brief in Support of Defendants' Motion for Summary Judgment (Docket Entry #105) is **DENIED**.

2. Plaintiffs' Motion to Strike Defendants' Summary Judgment Exhibits (Docket Entry #85) is **DENIED**.

3. Defendants' Motion for Summary Judgment (Docket Entry #46) is **GRANTED**. A written order setting forth the Court's reasons for its ruling and a final judgment shall be entered on or before October 31, 1997. The jury trial of October 20, 1997 is **STRICKEN**.

4. In light of the Court's ruling on Defendants' Motion for Summary Judgment, Defendants' First Motion in Limine to Preclude Reference to Widows and Orphans, the Alamo and Other Forms of Improper Advocacy (Docket Entry #65); Defendants' Second Motion in Limine to Prohibit References to Litigation Conduct (Docket Entry

#66); Defendants' Third Motion in Limine to Prohibit Reference to Any Matters Resolved by the Fifth Circuit in Mitchell Energy Corporation v. Samson Resources Company (Docket Entry #67); Defendants' Fourth Motion in Limine to Prohibit References to Any Duty or Failure by Samson to Clear Title to the Plaintiffs' Minerals (Docket Entry #68); Defendants' Fifth Motion in Limine to Preclude Reference to the Mitchell Jury Verdict (Docket Entry #69); Defendants' Sixth Motion in Limine (Docket Entry #70); and Plaintiffs' Motion in Limine (Docket Entry #96) are **MOOT**.

5. In light of the Court's ruling on Defendants' Motion for Summary Judgment, Defendants' Motion to Add Exhibit to Defendants' Exhibit List (Docket Entry #106) and Plaintiffs' Motion to Add Exhibit to Plaintiffs' Exhibit List (Docket Entry #108) are **MOOT**.

ENTERED this 8th day of October, 1997.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

FILED

OCT 9 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

vs.

KENNETH BAXTER,

Defendant.

CIVIL ACTION NO. 97CV714 BU(M)

ENTERED ON DOCKET

DATE 10-9-97

AGREED JUDGMENT AND ORDER OF PAYMENT

Plaintiff, the United States of America, having filed its Complaint herein, and the defendant, having consented to the making and entry of this Judgment without trial, hereby agree as follows:

1. This Court has jurisdiction over the subject matter of this litigation and over all parties thereto. The Complaint filed herein states a claim upon which relief can be granted.

2. The defendant hereby acknowledges and accepts service of the Complaint filed herein.

3. The defendant hereby agrees to the entry of Judgment in the principal sum of \$2,673.34, plus accrued interest of \$358.76, plus interest thereafter at the rate of 9% per annum until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the legal rate until paid, plus costs of this action, until paid in full.

4. Plaintiff's consent to the entry of this Judgment and Order of Payment is based upon certain financial information which defendant has provided it and the defendant's express representation to Plaintiff that he is unable to presently pay

the amount of indebtedness in full and the further representation of the defendant that Kenneth Baxter will well and truly honor and comply with the Order of Payment entered herein which provides terms and conditions for the defendant's payment of the Judgment, together with costs and accrued interest, in regular monthly installment payments, as follows:

(a) Beginning on or before the 10th day of October, 1997, the defendant shall tender to the United States a check or money order payable to the U.S. Department of Justice, in the amount of \$60.00, and a like sum on or before the 10th day of each following month until the entire amount of the Judgment, together with the costs and accrued postjudgment interest, is paid in full.

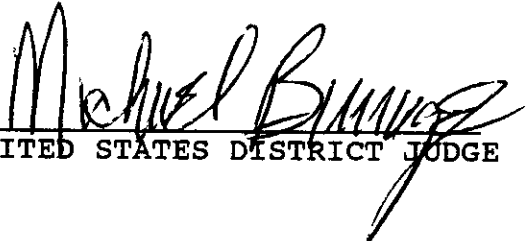
(b) The defendant shall mail each monthly installment payment to: United States Attorney, 333 West 4th Street, Suite 3460, Tulsa, Oklahoma 74103.

(c) Each said payment made by defendant shall be applied in accordance with the U.S. Rules, i.e., first to the payment of costs, second to the payment of postjudgment interest (as provided by 28 U.S.C. § 1961) accrued to the date of the receipt of said payment, and the balance, if any, to the principal.

4. Default under the terms of this Agreed Judgment will entitle the United States to execute on this Judgment without notice to the defendant.

5. The defendant has the right of prepayment of this debt without penalty.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, Kenneth Baxter, in the principal amount of \$2,673.34, plus accrued interest in the amount of \$358.76, plus interest at the rate of 9% until judgment, plus filing fees in the amount of \$150.00, plus interest thereafter at the current legal rate until paid, plus the costs of this action.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

Stephen C. Lewis
United States Attorney


LORETTA F. RADFORD, QBA #11158
Assistant United States Attorney


KENNETH BAXTER

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
OCT 9 1997 *CP*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BILLY LEE ROE,

Petitioner,

vs.

WASHINGTON COUNTY SHERIFF,
et al.,

Respondents.

No. 97-CV-541-BU (W)

ENTERED ON DOCKET

DATE 10-9-97

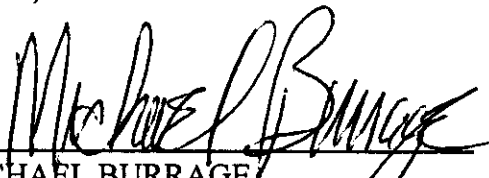
ORDER

Petitioner has filed an application for a writ of habeas corpus, but has neither submitted the proper \$5.00 filing fee, nor cured the deficiencies of his habeas application as directed by the Court on June 17, 1997. Specifically, the Court directed Petitioner to either pay the \$5.00 filing fee or file a motion for leave to proceed in forma pauperis and to submit his petition on the Court-approved form. Petitioner was granted until July 17, 1997, to comply with the Court's order. As of the date of this Order, Petitioner has failed to comply with the June 17, 1997 Order.

ACCORDINGLY, IT IS HEREBY ORDERED:

That the petition be **dismissed without prejudice** at this time for failure to pay the filing fee. See Local Rule 5.1(F). Upon good cause shown, the Court **may reinstate** this action if Petitioner submits the proper filing fee along with a motion for leave to re-open.

SO ORDERED THIS 8th day of October, 1997.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MARTY EUGENE SANDERS,

OCT 9 1997

Petitioner,

Phil Lombardi, Clerk
U.S. DISTRICT COURT

vs.

No. 97-CV-482-BU

U.S. MARSHAL SERVICE,

ENTERED ON DOCKET

Respondent.

DATE 10-9-97


ORDER

Petitioner has filed an application for a writ of habeas corpus, but has neither submitted the proper \$5.00 filing fee, nor cured the deficiencies of his habeas application as directed by the Court on July 24, 1997. Specifically, the Court directed Petitioner to either pay the \$5.00 filing fee or file a motion for leave to proceed in forma pauperis and to submit his petition on the Court-approved form. Petitioner was granted until August 13, 1997, to comply with the Court's order. As of the date of this Order, Petitioner has failed to comply with the July 24, 1997 Order.

ACCORDINGLY, IT IS HEREBY ORDERED:

That the petition be **dismissed without prejudice** at this time for failure to pay the filing fee. See Local Rule 5.1(F). Upon good cause shown, the Court **may reinstate** this action if Petitioner submits the proper filing fee along with a motion for leave to re-open.

SO ORDERED THIS 8th day of October, 1997.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 9 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

EVERETT R. WAGONER and
MADELINE WAGONER,

Plaintiffs,

vs.

Case No. 96-CV-935-BU

GRAND RIVER DAM AUTHORITY
and RONALD COKER, in his
official capacity as General
Manager and Chief Executive
Officer of the Grand River
Dam Authority,

Defendants.

WAYNE ROBERTS,

Plaintiff,

vs.

Case No. 96-CV-936-BU

GRAND RIVER DAM AUTHORITY
and RONALD COKER, in his
official capacity as General
Manager and Chief Executive
Officer of the Grand River
Dam Authority,

Defendants.

ENTERED ON DOCKET

DATE OCT 09 1997

ORDER

These matters come before the Court on the motions of the plaintiffs, Everett R. Wagoner, Madeline Wagoner and Wayne E. Roberts, to remand the above-entitled cases to the District Court of Ottawa County, Oklahoma. The defendants, Grand River Dam Authority and Ronald Coker, in his official capacity as General Manager and Chief Executive Officer of the Grand River Dam

Authority, have responded to the motions and the plaintiffs have replied thereto. Upon due consideration of the parties' submissions, the Court finds that the motions should be granted.

Defendants filed notices of removal in the above-entitled cases on October 11, 1996. This is the third time Defendants have removed these cases to this Court. On two prior removals, the Court remanded the cases to the state court, upon motions of the plaintiffs.

In the instant notices of removal, the defendants state that the plaintiffs admitted for the first time in their motions in limine filed in the state court on October 4, 1996 that they are seeking to impose liability upon the defendants under the provisions of the Federal Power Act, 16 U.S.C. § 791, et seq., specifically, 16 U.S.C. § 803(c). Because the plaintiffs' claims arise under federal law, the defendants contend that removal is proper under 28 U.S.C. § 1441(b).

The plaintiffs, in their motions to remand, contend that these actions should again be remanded to the District Court in Ottawa County, Oklahoma on the grounds that the defendants' third removal of these actions is untimely and not authorized by statute. The plaintiffs argue that the defendants' statement in the notices of removal that "Plaintiffs camouflaged the legal theory underlying their cause of action until their motion in limine was filed in state court" is simply not true. The plaintiffs assert that the

legal theory cited in support of their motions in limine were first cited in briefs in support of their motions to remand these actions after the defendants' second removal. The plaintiffs argue that the defendants' perception and characterization of the legal theory in the plaintiffs' motions in limine as a new argument or theory is incorrect. In addition, the plaintiffs assert that the defendants' notices of removal violate Rule 11, Fed.R.Civ.P., as the defendants failed to set forth all the procedural history of these cases and failed to provide copies of all pleadings of these cases in accordance with 28 U.S.C. § 1446(a).

The defendants contend that the removal is not untimely. The defendants maintain that the cases became removable upon the filing of the plaintiffs' motions in limine. The defendants state that for the first time, the plaintiffs argued that the defendants were liable for the plaintiffs' damages under the Federal Power Act. According to the defendants, the plaintiffs, on the two prior removals, had maintained that the actions were based on state law. It was not until the plaintiffs' arguments in the motions in limine that the defendants ascertained that the plaintiffs were seeking to impose liability based upon federal law. The defendants contend that the fact the plaintiffs may have raised a similar argument in the motions to remand on the second removal is immaterial. The defendants contend that the Honorable Sven Erik Holmes looked only to the pleadings and not the subsequent motions to remand to

determine the removability of the action. The defendants contend that nothing in the pleadings put Judge Holmes on notice that a federal claim had been filed. It was only the plaintiffs' filing of the motions in limine, the defendants argue, which presented the plaintiffs' theory of liability under federal law.

In reply, the plaintiffs specifically deny that they are making any claims under federal statutes and state that they cited the Federal Power Act in their motions in limine only to illustrate the fact that under its FERC license, the defendant, Grand River Dam Authority, is responsible for any damages which the plaintiffs prove at trial. The plaintiffs state that they have never alleged that any of their claims in these actions are based upon federal law. They further state that there has been no change in their allegations or claims since the actions were first filed in March, 1994.

Upon review of the motions in limine attached to the notices of removal, the Court concludes that the plaintiffs are not seeking to impose liability upon the defendants based upon federal law. The motions in limine are directed at the defendant, Grand River Dam Authority's anticipated defense and evidence relating to that defense. The plaintiffs cite to the Federal Power Act only to show that its provisions expressly negate the existence of a federal defense by a licensee for claims asserted under **state law**. The Court concludes that the plaintiffs have not changed their

allegations or claims so as to allege claims under federal law. The Court finds that the plaintiffs' claims are based exclusively upon state law. Because the plaintiffs predicate their suits upon state law and a case may not be removed on the basis of a federal defense to a state law cause of action, Caterpillar, Inc. v. Williams, 482 U.S. 386, 393, 107 S.Ct. 2425, 2430, 96 L.Ed.2d 318 (1987); Schmeling v. NORDAM, 97 F.3d 1336, 1339 (10th Cir. 1996); United Ass'n of Journeymen and Apprentices of Plumbing and Pipe Fitting Industry of U.S. and Canada, Local No. 57 v. Bechtel Power Corp., 834 F.2d 884, 890 (10th Cir. 1987), cert. denied, 486 U.S. 1055, 108 S.Ct. 2822, 100 L.Ed.2d 923 (1988), the Court finds that removal of these actions was improper and that remand is required under 28 U.S.C. § 1447(c).

Based upon the foregoing,

1. The plaintiffs, Everett R. Wagoner and Madeline Wagoner's Motion to Remand filed in Case No. 96-CV-935-BU (Docket Entry #3) and the plaintiff, Wayne E. Roberts' Motion to Remand filed in Case No. 96-CV-936-BU (Docket Entry #3) are **GRANTED**. The Clerk of this Court is **DIRECTED** to mail a certified copy of this Order to the Clerk of the District Court of Ottawa County, Oklahoma.

2. The plaintiffs, Everett R. Wagoner and Madeline Wagoner's Application for Expedited Consideration filed in Case No. 96-CV-935-BU (Docket Entry #5) and the plaintiff, Wayne E. Roberts' Application for Expedited Consideration filed in Case No. 96-CV-

936-BU (Docket Entry #5) are **DENIED**.

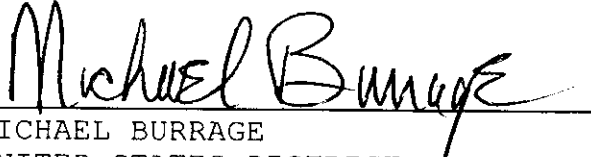
3. The defendant, Ronald Coker's Request for Hearing on Motion to Dismiss filed in Case No. 96-CV-935-BU (Docket Entry #8) and the defendant, Ronald Coker's Request for Hearing on Motion to Dismiss filed in Case No. 96-CV-936-BU (Docket Entry #8) are **MOOT**.

4. The defendants' Motion for Summary Judgment filed in Case No. 96-CV-935-BU (Docket Entry #14) and the defendants' Motion for Summary Judgment filed in Case No. 96-CV-936-BU (Docket Entry #14) are **MOOT**.

5. The defendants' Motion to Strike Affidavit, Motion for Default Judgment and Motion for Hearing filed in Case No. 96-CV-935-BU (Docket Entry #20) and the defendants' Motion to Strike Affidavit, Motion for Default Judgment and Motion for Hearing filed in Case No. 96-CV-936-BU (Docket Entry #19) are **MOOT**.

6. The defendant, Grand River Dam Authority's Motion for Stay of Proceedings Pending Interlocutory Appeal and Decision filed in Case No. 96-CV-935-BU (Docket Entry #24) and the defendant, Grand River Dam Authority's Motion to Stay Proceedings Pending Interlocutory Appeal and Decision filed in Case No. 96-CV-936-BU (Docket Entry #24) are **DENIED**.

ENTERED this 8th day of October, 1997.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 9 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

EVERETT R. WAGONER and
MADELINE WAGONER,

Plaintiffs,

vs.

Case No. 96-CV-935-BU

GRAND RIVER DAM AUTHORITY
and RONALD COKER, in his
official capacity as General
Manager and Chief Executive
Officer of the Grand River
Dam Authority,

Defendants.

WAYNE ROBERTS,

Plaintiff,

vs.

Case No. 96-CV-936-BU

GRAND RIVER DAM AUTHORITY
and RONALD COKER, in his
official capacity as General
Manager and Chief Executive
Officer of the Grand River
Dam Authority,

Defendants.

ENTERED ON DOCKET

DATE OCT 09 1997

ORDER

These matters come before the Court on the motions of the plaintiffs, Everett R. Wagoner, Madeline Wagoner and Wayne E. Roberts, to remand the above-entitled cases to the District Court of Ottawa County, Oklahoma. The defendants, Grand River Dam Authority and Ronald Coker, in his official capacity as General Manager and Chief Executive Officer of the Grand River Dam

Authority, have responded to the motions and the plaintiffs have replied thereto. Upon due consideration of the parties' submissions, the Court finds that the motions should be granted.

Defendants filed notices of removal in the above-entitled cases on October 11, 1996. This is the third time Defendants have removed these cases to this Court. On two prior removals, the Court remanded the cases to the state court, upon motions of the plaintiffs.

In the instant notices of removal, the defendants state that the plaintiffs admitted for the first time in their motions in limine filed in the state court on October 4, 1996 that they are seeking to impose liability upon the defendants under the provisions of the Federal Power Act, 16 U.S.C. § 791, et seq., specifically, 16 U.S.C. § 803(c). Because the plaintiffs' claims arise under federal law, the defendants contend that removal is proper under 28 U.S.C. § 1441(b).

The plaintiffs, in their motions to remand, contend that these actions should again be remanded to the District Court in Ottawa County, Oklahoma on the grounds that the defendants' third removal of these actions is untimely and not authorized by statute. The plaintiffs argue that the defendants' statement in the notices of removal that "Plaintiffs camouflaged the legal theory underlying their cause of action until their motion in limine was filed in state court" is simply not true. The plaintiffs assert that the

legal theory cited in support of their motions in limine were first cited in briefs in support of their motions to remand these actions after the defendants' second removal. The plaintiffs argue that the defendants' perception and characterization of the legal theory in the plaintiffs' motions in limine as a new argument or theory is incorrect. In addition, the plaintiffs assert that the defendants' notices of removal violate Rule 11, Fed.R.Civ.P., as the defendants failed to set forth all the procedural history of these cases and failed to provide copies of all pleadings of these cases in accordance with 28 U.S.C. § 1446(a).

The defendants contend that the removal is not untimely. The defendants maintain that the cases became removable upon the filing of the plaintiffs' motions in limine. The defendants state that for the first time, the plaintiffs argued that the defendants were liable for the plaintiffs' damages under the Federal Power Act. According to the defendants, the plaintiffs, on the two prior removals, had maintained that the actions were based on state law. It was not until the plaintiffs' arguments in the motions in limine that the defendants ascertained that the plaintiffs were seeking to impose liability based upon federal law. The defendants contend that the fact the plaintiffs may have raised a similar argument in the motions to remand on the second removal is immaterial. The defendants contend that the Honorable Sven Erik Holmes looked only to the pleadings and not the subsequent motions to remand to

determine the removability of the action. The defendants contend that nothing in the pleadings put Judge Holmes on notice that a federal claim had been filed. It was only the plaintiffs' filing of the motions in limine, the defendants argue, which presented the plaintiffs' theory of liability under federal law.

In reply, the plaintiffs specifically deny that they are making any claims under federal statutes and state that they cited the Federal Power Act in their motions in limine only to illustrate the fact that under its FERC license, the defendant, Grand River Dam Authority, is responsible for any damages which the plaintiffs prove at trial. The plaintiffs state that they have never alleged that any of their claims in these actions are based upon federal law. They further state that there has been no change in their allegations or claims since the actions were first filed in March, 1994.

Upon review of the motions in limine attached to the notices of removal, the Court concludes that the plaintiffs are not seeking to impose liability upon the defendants based upon federal law. The motions in limine are directed at the defendant, Grand River Dam Authority's anticipated defense and evidence relating to that defense. The plaintiffs cite to the Federal Power Act only to show that its provisions expressly negate the existence of a federal defense by a licensee for claims asserted under **state law**. The Court concludes that the plaintiffs have not changed their

allegations or claims so as to allege claims under federal law. The Court finds that the plaintiffs' claims are based exclusively upon state law. Because the plaintiffs predicate their suits upon state law and a case may not be removed on the basis of a federal defense to a state law cause of action, Caterpillar, Inc. v. Williams, 482 U.S. 386, 393, 107 S.Ct. 2425, 2430, 96 L.Ed.2d 318 (1987); Schmeling v. NORDAM, 97 F.3d 1336, 1339 (10th Cir. 1996); United Ass'n of Journeymen and Apprentices of Plumbing and Pipe Fitting Industry of U.S. and Canada, Local No. 57 v. Bechtel Power Corp., 834 F.2d 884, 890 (10th Cir. 1987), cert. denied, 486 U.S. 1055, 108 S.Ct. 2822, 100 L.Ed.2d 923 (1988), the Court finds that removal of these actions was improper and that remand is required under 28 U.S.C. § 1447(c).

Based upon the foregoing,

1. The plaintiffs, Everett R. Wagoner and Madeline Wagoner's Motion to Remand filed in Case No. 96-CV-935-BU (Docket Entry #3) and the plaintiff, Wayne E. Roberts' Motion to Remand filed in Case No. 96-CV-936-BU (Docket Entry #3) are **GRANTED**. The Clerk of this Court is **DIRECTED** to mail a certified copy of this Order to the Clerk of the District Court of Ottawa County, Oklahoma.

2. The plaintiffs, Everett R. Wagoner and Madeline Wagoner's Application for Expedited Consideration filed in Case No. 96-CV-935-BU (Docket Entry #5) and the plaintiff, Wayne E. Roberts' Application for Expedited Consideration filed in Case No. 96-CV-

936-BU (Docket Entry #5) are **DENIED**.

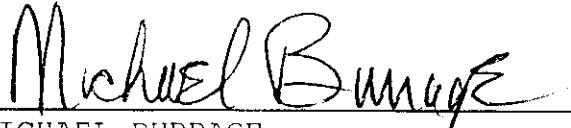
3. The defendant, Ronald Coker's Request for Hearing on Motion to Dismiss filed in Case No. 96-CV-935-BU (Docket Entry #8) and the defendant, Ronald Coker's Request for Hearing on Motion to Dismiss filed in Case No. 96-CV-936-BU (Docket Entry #8) are **MOOT**.

4. The defendants' Motion for Summary Judgment filed in Case No. 96-CV-935-BU (Docket Entry #14) and the defendants' Motion for Summary Judgment filed in Case No. 96-CV-936-BU (Docket Entry #14) are **MOOT**.

5. The defendants' Motion to Strike Affidavit, Motion for Default Judgment and Motion for Hearing filed in Case No. 96-CV-935-BU (Docket Entry #20) and the defendants' Motion to Strike Affidavit, Motion for Default Judgment and Motion for Hearing filed in Case No. 96-CV-936-BU (Docket Entry #19) are **MOOT**.

6. The defendant, Grand River Dam Authority's Motion for Stay of Proceedings Pending Interlocutory Appeal and Decision filed in Case No. 96-CV-935-BU (Docket Entry #24) and the defendant, Grand River Dam Authority's Motion to Stay Proceedings Pending Interlocutory Appeal and Decision filed in Case No. 96-CV-936-BU (Docket Entry #24) are **DENIED**.

ENTERED this 8th day of October, 1997.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA**

RICHARD A. PIZZO, and
VICTORIA BARRICK-PIZZO,

Plaintiffs,

vs.

MASSACHUSETTS BAY INSURANCE CO.,

Defendant.

ENTERED ON DOCKET

DATE OCT 09 1997

Case No. 97-CV-562-Bu(J) ✓

FILED

OCT - 7 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER^{1/}

Defendant removed this case from Tulsa County, Oklahoma by filing a notice of removal on June 11, 1997. See 28 U.S.C. § 1441(a) & 1446. Defendant is a citizen of New Hampshire and Massachusetts. Plaintiffs are citizens of Oklahoma. In its notice of removal, Defendant alleges that 28 U.S.C. § 1332(a) provides the Court with subject matter jurisdiction over Plaintiffs' claims. See Doc. No. 1. That is, Defendant argues that the citizenship of the parties is diverse and the amount in controversy exceeds \$75,000.00, exclusive of interest and costs.

Now before the Court is "Plaintiffs' Motion to Remand to State Court." [Doc. No. 6]. Plaintiff argues that the Court lacks subject matter jurisdiction under § 1332(a) because the amount in controversy does not exceed \$75,000.00. See 28 U.S.C. § 1447(c). For the reasons discussed below, the Court agrees that the amount

^{1/} This Order is entered pursuant to the referral filed by Judge Michael Burrage on August 1, 1997 and pursuant to 28 U.S.C. § 636(b)(1)(A) and Fed. R. Civ. P. 72(a).

in controversy in this case does not exceed \$75,000.00. Consequently, Plaintiffs' motion to remand is **GRANTED**.

I. SUMMARY OF THE PLEADINGS

Defendant issued Plaintiffs a motor vehicle insurance policy ("the policy"). The policy insured Plaintiffs against liability and collision. Defendant terminated its policy with Plaintiffs on January 1, 1997. Plaintiffs allege that Defendant's cancellation violated 36 Okla. Stat. § 941, which provides as follows:

No insurance carrier who issues motor vehicle insurance policies in this state shall . . . cancel [or] refuse to renew . . . any liability or collision insurance policy for the reason that the insured has been involved in a motor vehicle collision and was not at fault.

36 Okla. Stat. § 941. Plaintiffs also allege that Defendant (1) acted in bad faith when it terminated its policy with Plaintiffs, and (2) intentionally inflicted emotional distress on Plaintiffs. See Plaintiffs' Petition, attached to Defendant's Notice of Removal, Doc. No. 1.

At the conclusion of their Petition, Plaintiffs "request judgment in excess of Ten thousand and no/100 dollars (\$10,000.00)" and all other relief the Court deems appropriate. See Plaintiffs' Petition, attached to Defendant's Notice of Removal, Doc. No. 1. Plaintiffs were required to plead their damages in such an ambiguous way by 12 Okla. Stat. § 2008, which provides as follows:

Every pleading demanding relief for damages in money in excess of Ten Thousand Dollars (\$10,000.00) shall, without demanding any specific amount of money, set forth only that the amount sought as damages is in excess of Ten

Thousand Dollars (\$10,000.00), except in actions sounding in contract.

12 Okla. Stat. § 2008(A)(2).

Plaintiffs allege that as a result of Defendant's wrongful termination of the policy, Plaintiffs were forced to obtain motor vehicle insurance at a higher premium and with less coverage than the policy they had with Defendant. Thus, Plaintiffs' compensatory damages are limited to (1) damages for the alleged emotional distress caused by Defendant's wrongful termination, and (2) the difference in relative premiums between the policy Plaintiffs had with Defendant and the policy Plaintiffs obtained after Defendant terminated the policy.

Plaintiffs do not specifically seek punitive damages in their Petition. However, Plaintiffs have filed discovery responses in which they indicate that they are indeed seeking punitive damages in addition to compensatory damages. Defendant propounded the following interrogatory: "Are you claiming in excess of \$75,000.00 in total damages?" Plaintiffs answered the interrogatory as follows: "Unknown at this time. The amount claimed for actual damages will not be in excess of \$75,000.00. However, with punitive damages, the total damages will be determined by a jury." See Plaintiffs' Petition and Plaintiffs' Answers to Defendant's First Requests for Admissions and Interrogatories, attached to Defendant's Notice of Removal, Doc. No. 1.

II. DISCUSSION

Removal of an action properly lodged in state court is by no means automatic. Removal from state to federal court is a statutory creature governed by 28 U.S.C. § 1441-1452. The removal statutes are to be strictly construed and all doubts are to be resolved in favor of remand and against removal. The party seeking to remove the case from state to federal court has the burden of establishing that the federal court has subject matter jurisdiction. Fajen v. Foundation Reserve Ins. Co., 683 F.2d 331, 333 (10th Cir. 1982) (internal citations omitted).

In this case, Defendant is the party seeking removal and Defendant argues that this court has subject matter jurisdiction under 28 U.S.C. § 1332(a). The parties agree that § 1332(a)'s first requirement is met. That is, the parties agree that this is a civil action "between citizens of different States." 28 U.S.C. § 1332(a)(1). However, Plaintiffs argue that § 1332(a)'s second requirement is not met in this case. That is, Plaintiffs argue that "the matter in controversy [does not exceed] the sum or value of \$75,000, exclusive of interest and costs." 28 U.S.C. § 1332(a). Therefore, Defendant has the burden of establishing that the amount in controversy does exceed \$75,000.00.

Ordinarily, the amount in controversy is to be determined by the allegations in the plaintiff's pleadings. Lonnquist v. J.C. Penny Co., 421 F.2d 597, 599 (10th Cir. 1970) (citing several cases). This standard is neither sufficient or easily applied when state rules of procedure, like 12 Okla. Stat. § 2008(A)(2), restrict the ability of a litigant to specifically plead amounts in controversy. When the amount in controversy

cannot be clearly discerned from the plaintiff's pleadings, the defendant bears the burden of establishing the amount in controversy. The courts of appeal have split on the evidentiary standard which should govern a defendant's attempt to establish the amount in controversy when the plaintiff's pleadings are inconclusive. At least three distinct standards have emerged. See Jack E. Karns, Removal to Federal Court and the Jurisdictional Amount in Controversy Pursuant to State Statutory Limitations on Pleading Damage Claims, 29 Creighton L. Rev. 1091 (1996).

The United States Courts of Appeal for the Fifth and Eleventh Circuits hold that a defendant is required to establish to a legal certainty that the plaintiff would, if successful, recover more than \$75,000.00 -- the legal certainty test. See Kliebert v. Upjohn Co., 915 F.2d 142 (5th Cir. 1990), vacated on grant of reh'g en banc, 923 F.2d 47 (5th Cir. 1991), dismissed after settlement, 947 F.2d 736 (5th Cir. 1991); Asociacion Nacional de Pescadores Escala O Artesanales de Columbia v. Dow Quimica de Columbia, S.A., 988 F.2d 559, 562 (5th Cir. 1993); Burns v. Windsor Ins. Co., 31 F.3d 1092 (11th Cir. 1994). The United States Court of Appeal for the Sixth Circuit holds that a defendant is required to establish that it is more likely than not that plaintiff's damages will exceed \$75,000.00 -- the preponderance of the evidence test. See Gafford v. General Electric Co., 997 F.2d 150 (6th Cir. 1993). The United States Courts of Appeal for the Third and Seventh Circuits hold that a defendant is required to establish that there is a reasonable probability that the plaintiff's damages will exceed \$75,000.00 -- the reasonable probability test. See Angus v. Shiley, Inc., 989

F.2d 142 (3d Cir. 1993); Shaw v. Dow Brands, Inc., 994 F.2d 364 (7th Cir. 1993).

The Tenth Circuit has not addressed the issue.

The Court need not determine which of the three tests is the most appropriate for all cases. The Court will apply the test which is most favorable to Defendant -- the reasonable probability test. Under this test, the Defendant need only show that there is a reasonable probability that Plaintiffs' damages will exceed \$75,000.00. Using this test, the Court finds that Defendant has not met its burden.

The Court, in determining the amount in controversy, is not required to leave its common sense behind. In this case, common sense applied to Plaintiffs' allegations compels the Court to conclude that there is no reasonable probability that Plaintiffs' damages will exceed \$75,000.00. The compensatory damages sought by Plaintiffs amount to the difference in premiums between two automobile insurance policies and some unsubstantial amount for emotional distress. Defendant has not attempted to quantify this amount for the Court. For purposes of determining the amount in controversy, the Court is hard pressed, to view Plaintiffs actual damages at more than \$10,000.00.

Unless plaintiff is precluded as a matter of law from seeking punitive damages, a good faith claim for punitive damages must be considered along with compensatory damages to determine the amount in controversy. Bell v. Preferred Life Assurance Society, 320 U.S. 238, 240-41 (1943). Thus, if the relevant state law permits punitive damages on the facts alleged, punitive damages must be considered part of the amount in controversy. In Oklahoma, a jury is permitted to award at least

\$100,000.00 to a plaintiff who proves that his insurer "recklessly disregarded its duty to deal fairly and act in good faith with its insured." 23 Okla. Stat. § 9.1(B)(1). Defendant argues that because the possibility of a punitive damages award of \$100,000.00 exists, the amount in controversy exceeds \$75,000.00.

The Court concedes that there is a possibility that Plaintiff may receive \$100,000.00 in punitive damages. However, in light of the actual damages claimed and the nature of Defendant's alleged misconduct, the Court does not believe that there is a "reasonable" possibility that Plaintiff will recover \$100,000.00 in punitive damages. This is especially true in light of the United States Supreme Court's holding in Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991).

In Haslip the insurance company was found liable for defrauding its insured, The insurer continued to accept premiums from the insured, despite the fact that the policy had in fact been canceled without notice to the insured. The jury awarded punitive damages equal to four times the amount of compensatory damages. The Supreme Court upheld the punitive damages award, but held that the award came very close to the line of constitutional permissibility. Id. at 23.

The conduct alleged to have been committed by the insurer in this case is not as egregious as that committed by the insurer in Haslip. The Court would, therefore, be hard pressed to permit a punitive damages award more excessive than that approved in Haslip. A punitive damages award in this case of four to five times Plaintiffs' compensatory damages would come very close to the line of constitutional

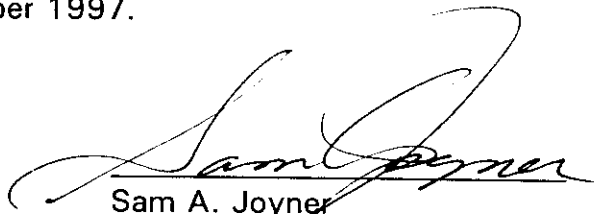
permissibility. The "reasonable" probability is, therefore, that Plaintiff would only be entitled to \$40,000.00-\$50,000.00 in punitive damages.

CONCLUSION

The Court determines that Defendant has only demonstrated a reasonable probability that Plaintiff will recover approximately \$60,000.00 in damages -- \$10,000.00 in compensatory damages and \$40,000.00-\$50,000.00 in punitive damages. Defendant has failed to demonstrate that there is a reasonable probability that Plaintiff will be entitled to damages in excess of \$75,000.00. Consequently, the Court lacks subject matter jurisdiction under 28 U.S.C. § 1332(a). Plaintiffs' motion to remand (doc. no. 6) is **GRANTED** and the Court Clerk is directed to remand this case to the District Court in and for Tulsa County, Oklahoma.

IT IS SO ORDERED.

Dated this 7 day of October 1997.


Sam A. Joyner
United States Magistrate Judge

DATE 10-8-97

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

OCT 08 1997 *PL*

RICHARD POUNDS, et al.,

Plaintiffs,

v.

OTTAWA DISTRICT COURT,
et al.,

Defendants.

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-C-895-K ✓

REPORT AND RECOMMENDATION OF U. S. MAGISTRATE JUDGE

On August 22, 1997, this action was referred to the United States Magistrate Judge for a status conference, with a view to resolving whether plaintiffs state a claim against the remaining defendants, and whether discovery is necessary (Docket #68). A status conference was held on October 7, 1997. Nathan H. Young appeared on behalf of Richard James, Eastern Shawnee Tribal Counsel, and Eastern Shawnee Tribal Officials, Dee Childers appeared for the Eastern Shawnee Tribe, and Cathryn McClanahan appeared for the federal defendants. Plaintiffs did not appear.

The court has established that notice of the status conference was sent by mail to the plaintiffs at the address which they have used in this case: P.O. Box 985, Mannford, Oklahoma, 74044.

It is recommended that this case be dismissed for failure to prosecute and appear at the status conference.

Pursuant to 28 U.S.C. § 636(b)(1)(C), the parties are given ten (10) days from the above filing date to file any objections with supporting brief to these findings and

710

recommendations. Failure to object within that time period will result in waiver of the right to appeal from a judgment of the district court based upon the findings and recommendations of the Magistrate Judge.

Dated this 8th day of October, 1997.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 8 Day of October, 1997.

J. Schwelke, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT **FILED**
FOR THE NORTHERN DISTRICT OF OKLAHOMA

OCT - 7 1997

PERNELL JEFFERSON,

Plaintiff,

vs.

RON ISAAC, and DR. JOHNSON,

Defendants.

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-117-B

ENTERED ON DOCKET


DATE OCT 8 1997

ORDER

There being no timely objection by Plaintiff, the undersigned hereby adopts the Report and Recommendation of Magistrate Judge Frank McCarthy dismissing the action without prejudice for failure to prosecute (Docket # 4).

The matter is DISMISSED WITHOUT PREJUDICE for failure to prosecute.

IT IS SO ORDERED this 7th day of October, 1997.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

32

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

NEWPORT VILLAGE, L.L.C., an
Oklahoma limited liability company,

Plaintiff,

v.

UNITED STATES OF AMERICA,
acting by and through the United States
Army Corps of Engineers,

Defendant.

ENTERED ON DOCKET

)
) DATE OCT 6 8 1997
)

FILED

OCT 7 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

) Case No. 97-CV-850-B ✓
)

) Delaware County District Court
) Case No. CV-97-285
)
)
)

STIPULATION FOR DISMISSAL

The plaintiff, Newport Village, L.L. C., by and through their attorney of record, Tommy Dyer, and the defendant, the United States of America, acting by and through the United States Army Corps of Engineers ("CORPS"), by and through Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, and Phil Pinnell, Assistant United States Attorney, pursuant to Fed. R. Civ. P. 41(a)(1)(ii), hereby stipulate to the dismissal of the above matter without prejudice. Each party shall bear their own costs and attorney's fees.

Respectfully submitted,


STEPHEN C. LEWIS
United States Attorney

Phil Pinnell
PHIL PINNELL, OBA #7169
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

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CT

Newport Village, L.L. C. V. United States of America
Case No. 97-CV-850-B



Tommy R. Dyer, Jr.
Attorney for Plaintiff
P.O. Box 487
Jay, Oklahoma 74346-0487

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

OCT - 7 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Intelligent Solutions Group, Inc.,
an Oklahoma corporation,

Plaintiff,

v.

Case No. 97CV 736B (J)

VISIONAEL Corporation, a Delaware
corporation, successor by merger with
-ael-Advanced Graphics Systems, Inc.,
a former Oklahoma corporation,

Defendant.

ENTERED ON DOCKET
DATE OCT 8 3 1997

ORDER DISMISSING CASE WITHOUT PREJUDICE

Now on this 6th day of October, 1997, the matter of *Plaintiff's Application for Order of Dismissal* comes before this Court, and the Court, having examined the files and records, FINDS that this matter should be dismissed at this time for insufficient ability to establish federal jurisdiction as required by 28 U.S.C. § 1332.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this matter is dismissed without prejudice at this time for failure to meet the diversity of citizenship requirements of 28 U.S.C. §1332.


Judge of the District Court

CERTIFICATE OF MAILING

This is to certify that on this _____ day of October, 1997, a true, correct and exact copy of the above and foregoing instrument was mailed via regular United States Mail with proper postage thereon fully prepaid to:

John J. Carwile
Doerner, Saunders, Daniel & Anderson
320 South Boston, Suite 500
Tulsa, Oklahoma 74103
Attorney for Defendant



James R. Hicks

6728-2 \sharon\stege\plead.004

IN THE UNITED STATES DISTRICT COURT **FILED**
FOR THE NORTHERN DISTRICT OF OKLAHOMA

OCT - 7 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CATHY MORGAN and CAROL
LEWALLEN, individuals,

Plaintiffs,

v.

Case No. 97-CV-712-B(M)

PAUL DAVIS SYSTEMS OF TULSA, INC.
an Oklahoma corporation, and
THOMAS CULVER, an individual,

Defendants.

ENTERED ON DOCKET
DATE OCT 10 1997

ORDER OF DISMISSAL

This cause having come before this Court on the Joint Application for Dismissal with Prejudice, and this Court being fully advised in the premises, and the parties having stipulated and the Court having found that the parties have reached a private settlement of the claims of Plaintiffs, and that such claims should be dismissed with prejudice, it is, therefore, ORDERED, ADJUDGED AND DECREED that the Complaint of Plaintiffs, together with any causes of action asserted therein, be and hereby are dismissed with prejudice, with each party to bear its own fees and costs.

So Ordered this 6th day of Oct., 1997.

Thomas R. Brett
United States District Judge

APPROVED AS TO FORM AND CONTENT:

Erin A. Hume
Attorney for Plaintiff

Thomas Culver
Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 7 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DOROTHY P. AND DAVID W. BRITTON,))
husband and wife, and as individuals,))

Plaintiffs,))

vs.))

Case No. 96-C-364-E

BERENDSON FLUID POWER, INC., an))
Oklahoma corporation; BEREENDSON))
FLUID POWER, INC. HEALTH AND))
WELFARE PLAN, an employee benefit plan))
for participants in Oklahoma; BERENDSON))
FLUID POWER, INC., Plan Administrator))
and an Oklahoma corporation; PRINCIPAL))
MUTUAL LIFE INSURANCE COMPANY,))
an Iowa corporation; and JOHN PALOVIK,))
an individual and in his capacity as officer for))
Berendson Fluid Power, Inc.,))


Defendants.))

ENTERED ON DOCKET
DATE OCT 08 1997

JUDGMENT

In accord with the Order filed this date sustaining the Defendant's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendants, Berendson Fluid Power, Inc., Berendson Fluid Power, Inc. Health and Welfare Plan, Principal Mutual Life Insurance Company, and John Palovik and against the Plaintiffs, Dorothy P. and David W. Britton. Plaintiffs shall take nothing of their claim.

IT IS SO ORDERED THIS 6th DAY OF OCTOBER, 1997.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D

OCT 7 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DOROTHY P. AND DAVID W. BRITTON,))
husband and wife, and as individuals,))

Plaintiffs,))

vs.))

Case No. 96-C-364-E

BERENDSON FLUID POWER, INC., an))
Oklahoma corporation; BERENDSON))
FLUID POWER, INC. HEALTH AND))
WELFARE PLAN, an employee benefit plan))
for participants in Oklahoma; BERENDSON))
FLUID POWER, INC., Plan Administrator))
and an Oklahoma corporation; PRINCIPAL))
MUTUAL LIFE INSURANCE COMPANY,))
an Iowa corporation; and JOHN PALOVIK,))
an individual and in his capacity as officer for))
Berendson Fluid Power, Inc.,))

Defendants.))

ENTERED ON DOCKET

DATE OCT 08 1997

ORDER

Now before the Court is the Motion for Summary Judgment (Docket #17) of the Defendants Berendson Fluid Power, Inc., Berendson Fluid Power, Inc. Health and Welfare Plan, Principal Mutual Life Insurance Company, and John Palovik.

Plaintiffs originally brought this claim against defendants for breach of contract, misrepresentation, and gross negligence alleging that defendants wrongfully failed to provide medical coverage for injuries sustained by Mr. Britton. Defendants removed this action to federal court, asserting that Plaintiff's claim relates to an employee benefit plan within the meaning of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1001, et seq. Plaintiffs then amended their complaint to state claims for breach of contract, fraud, negligence, breach of fiduciary duty, and bad faith. Plaintiffs allege that Defendants failed to pay the medical bills of David Britton, a self-

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employed trucker, and the husband of Dorothy Britton, a Berendson employee. David Britton was injured on March 15, 1994, when he fell from his dump truck while attempting to deliver some materials to one of his customers. Berendson denied the claims stemming from David Britton's treatment for this injury, based on the limitation that covered charges will not include and no benefits will be paid for "confinement, treatment, or service that results from an injury arising out of or in the course of any employment for wage or profit."

The Brittons claim that defendants wrongfully denied payment of the claims and that defendants misrepresented the scope of coverage when they told Dorothy Britton that medical coverage would be provided for her husband prior to his admission to the hospital for surgery. The Brittons also claim that the denial of benefits was in bad faith, and that the decision to deny benefits was a breach of fiduciary duty. Defendants seek summary judgment, claiming that the state law tort claims of plaintiffs are preempted by ERISA, and that, in the alternative, they are entitled to judgment under ERISA.

Legal Analysis

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

"The plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at

trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

Preemption

Defendants first argue that the four causes of action pled in plaintiffs' amended complaint are preempted by ERISA. In 29 U.S.C. §1144(a), Congress established preemption of "all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title." In general, claims are preempted by ERISA if they "relate to an employee benefit plan," and, in this context, the words "relate to" are to be interpreted in their broad sense. Maez v. Mountain States Tel. And Tel., Inc., 54 F.3d 1488, 1496 (10th Cir. 1995).

Plaintiffs, relying on Kohn v. Delaware Valley HMO, Inc., Civ. A. No. 91-2745, 1991 Westlaw 276609 (E.D. Pa. 1991), and Hospice of Metro Denver, Inc. v. Group Health Insurance of Oklahoma, Inc., 944 F.2d 752 (10th Cir. 1991), assert that there is no preemption because preemption would shield the defendants from liability and would not further the purposes of ERISA. Kohn and Hospice of Metro Denver are distinguishable from this case in that they are not cases where the plaintiff is a plan beneficiary suing for benefits under the plan. In Kohn, the court held that ERISA did not preempt a malpractice claim against an HMO based on vicarious liability of the actions of the HMO's health care providers, and in Hospice of Metro Denver, the court held that ERISA did not preempt claims by a medical care provider against an insurer for promissory estoppel and quantum meruit.

In cases where plan beneficiaries are alleging that they are entitled to benefits under a plan,

preemption has been held to apply. Maez, 54 F.3d at p. 1496. The Court in Hospice of Metro Denver, 944 F.2d at p. 756 noted “we have held that ERISA preempts state law claims by plan participants or beneficiaries for bad faith denial of benefits [citations omitted], breach of contract and wrongful death [citations omitted], and negligent misrepresentation [citations omitted].” Moreover, the lack of adequate remedy under ERISA is not sufficient reason to find that preemption does not exist. See, e.g., Maez, 54 F.3d at p. 1497. Under these facts, plaintiffs’ claims are preempted by ERISA.

Claims under ERISA

Although plaintiffs’ amended complaint does not expressly state a claim for benefits pursuant to ERISA, plaintiffs’ argument in their response to defendants’ motion for summary judgment indicates that they believe they state a claim under ERISA. In light of that argument, defendants argue that summary judgment is also appropriate on any ERISA claim because there is no evidence that the denial of medical benefits was arbitrary and capricious.

Plaintiffs do not dispute the existence of specific language in the plan excluding coverage for on-the-job injuries. In support of their assertion that the denial of benefits was a breach of defendants’ fiduciary duty, and arbitrary and capricious, plaintiffs make two arguments. First, plaintiffs argue that, because exceptions were made to the plan, and benefits paid to other plan beneficiaries who suffered on-the-job injuries, defendants denial of plaintiffs’ claim constitutes a failure to act with the prudence and fairness required by ERISA. This circuit has rejected the idea that different treatment of individuals under the plan constitutes a breach of fiduciary duty. Averhart v. U.S. West Management Pension Plan, 46 F.3d 1480 (10th Cir. 1994), citing with approval McGrath v. Auto-Body North Shore, Inc., 7 F.3d 665, 670 (7th Cir. 1993) (“Because the plan must


be administered according to its terms, [footnote omitted][plaintiff] cannot complain because he is held to those terms; this is true even if the rules were bent for another individual.”)

Second, plaintiffs argue that, because, prior to David Britton’s admission to the hospital for surgery, they were told coverage would be provided, defendants are estopped from now denying benefits. This argument is not supported by the facts of this case. Dorothy Britton’s own testimony establishes that she requested approval prior to her husband’s surgery and that she was told he was covered under the policy and to admit him. Dorothy Britton did not explain the circumstances of the accident, and at that time, defendants were not aware that David Britton had been injured in the course of his employment. The facts simply do not support a “misrepresentation” as alleged by plaintiffs.

Lastly, plaintiffs argue that the Benefits Plan violates public policy because the plan participants were not informed of the exclusion. The Brittons do not deny that they were provided with plan summary booklets which stated the exclusion, but merely that there was no meeting to inform them of the exclusion. Further, the Brittons argue that they were not actually aware of the exclusion. Plaintiffs do not provide any authority for their assertion that, under these facts, there is a duty to hold a meeting to discuss the plan provisions.

Defendants’ Motion for Summary Judgment (Docket #17) is granted.

IT IS SO ORDERED THIS 6TH DAY OF OCTOBER, 1997.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D

OCT - 6 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JAMES A. CHRISTOPHER

Plaintiff(s),

vs.

Civil No.: 96-CV-905-H

KENDAVIS HOLDING COMPANY
a Nevada corporation; URE CO., a Texas
corporation; and TEREX CORPORATION,
a Delaware corporation

Defendants.

ENTERED ON DOCKET

DATE 10-7-97

CLERK'S ENTRY OF DEFAULT


It appearing from the files and records of this Court as of 10/6/97 and the affidavit filed of record, that the defendant, URE Co., against whom judgment for affirmative relief is sought in this action, has failed to plead or otherwise defend as provided by the Federal Rules of Civil Procedure; now, therefore,

I, PHIL LOMBARDI, Clerk of said Court, pursuant to the requirements of Rule 55(a) of said rules, do hereby enter the default of said defendant.

Dated at Tulsa, Oklahoma on October 6, 1997

PHIL LOMBARDI,

Clerk, U.S. District Court



S. SCHWEBKE

ENTERED ON DOCKET

DATE 10-7-97

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 06 1997 *PL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LEWIS WAYNE HUMBYRD and
B.A. ENTERPRISES,

Plaintiffs,

vs.

DOMINO'S PIZZA, INC.,

Defendant.

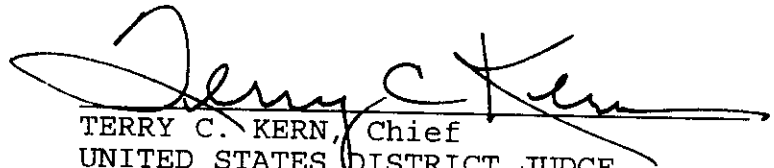
No. 96-C-1022-K ✓

JUDGMENT

This matter came before the Court for consideration of the Defendant's motion for summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Defendant and against the Plaintiffs.

ORDERED THIS DAY OF 6 OCTOBER, 1997


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 10-7-97

LEWIS WAYNE HUMBYRD and
B.A. ENTERPRISES, INC.,

Plaintiffs,

vs.

DOMINO'S PIZZA, INC.,

Defendant.

No. 96-C-1022-K

F I L E D

OCT 06 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

O R D E R

Before the Court are two motions of the defendant for summary judgment. Defendant Domino's Pizza, Inc. ("Domino's"), filed a complaint and motion for preliminary injunction and request for hearing on February 28, 1995 against B.A. Enterprises, Inc. ("BAE"), as franchisee and Lewis Wayne Humbyrd ("Humbyrd"), as BAE's guarantor, under the franchise agreement entered into between the parties. The complaint alleged several causes of action against BAE and Humbyrd, including breach of the franchise agreement.

BAE and Humbyrd filed proposed findings of fact and conclusions of law on March 7, 1995, which claimed that Domino's had itself breached the franchise agreement. BAE and Humbyrd filed amended proposed findings of fact and conclusions of law on April 6, 1995, which alleged that Domino's had compromised the value of the franchisee's store operations by selling other franchises in the same area for the sum of \$1.00. BAE and Humbyrd also alleged that Domino's had breached the implied covenant of good faith and

fair dealing inherent in the franchise agreement. BAE and Humbyrd also filed an answer which asserted that Domino's had breached the franchise agreements.

After a hearing, Judge Thomas R. Brett of this Court entered Findings of Fact and Conclusions of Law in favor of Domino's on April 28, 1995. On July 6, 1995, Judge Brett entered a Judgment in the case in favor of Domino's, assessing a money judgment against BAE and Humbyrd. The parties have referred to the Judgment as a "consent judgment", although the Judgment itself does not contain such a reference. BAE and Humbyrd did not appeal the Judgment.

BAE and Humbyrd have now filed the present action, alleging breach of the franchise agreement and breach of the covenant of good faith against Domino's. Domino's moves for grant of summary judgment on the ground of res judicata. Under that doctrine, "a final judgment on the merits of an action precludes the parties. . . from relitigating issues that were or could have been raised in that action." Allen v. McCurry, 449 U.S. 90, 94 (1980). In May v. Parker-Abbott Transfer & Storage, Inc., 899 F.2d 1007 (10th Cir.1990), the court said:

[A] final judgment on the merits bars further claims by parties . . . on the same cause of action The same rule applies when, as here, a suit is dismissed "with prejudice" by consent decree. . . .

In order to determine what constitutes a single "cause of action" in any given case, this circuit applies the transactional approach. . . .

What factual grouping constitutes a "transaction". . . . [is] determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation,

whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations.

Id. at 1009-10 (internal quotations and citations omitted).


In response to the present motion, plaintiffs admit "to making the factual allegations contained within this complaint in the prior litigation as an affirmative defense to the injunction issue. . . ." (Plaintiffs' response at 11). Plaintiffs argue that because the present action is based in tort rather than breach of contract, res judicata principles are avoided. The Tenth Circuit has rejected this position. See McCarty v. First of Georgia Ins. Co., 713 F.2d 609, 612 (10th Cir.1983). Further the fact that BAE and Humbyrd did not formally raise a "claim" in the prior litigation is unavailing. Under the transactional test, all rights and remedies are barred, whether or not brought in the first litigation. See Petromanagement Corp. v. Acme-Thomas Joint Venture, 835 F.2d 1329, 1335 (10th Cir.1988). Summary judgment is appropriate on res judicata grounds.

Defendant has filed a second motion for summary judgment on statute of limitation grounds. Defendant relies upon Humbyrd's deposition testimony regarding when he learned that Domino's was selling franchises for \$1.00. Plaintiffs have responded with an affidavit executed by Humbyrd in which he purports to explain his deposition testimony, and disavows that he had knowledge of Domino's actions at a point in time which would bar the present action. Under the circumstances, the Court believes the statute of limitation issue would be one for the jury to consider, and

therefore the second motion will not be granted.

It is the Order of the Court that the motion of the defendant for summary judgment on statute of limitation grounds (#12) is hereby DENIED. The motion of the defendant for summary judgment on res judicata grounds (#6) is hereby GRANTED.

ORDERED this 6 day of October, 1997.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE


DATE 10-7-97

CERTIFICATE OF SERVICE

This is to certify that on the ____ day of October 1997, a true and correct copy of the foregoing Clerk's Entry of Default was mailed, postage prepaid thereon to:

Nasir Rana
4828 S. Darlington
Tulsa, OK 74135

Nasir Rana d/b/a Far's Food Mart
6136 - A North Cincinnati
Tulsa, OK 74126


LORETTA F. RADFORD
Assistant United States Attorney

ENTERED ON DOCKET

DATE 10-7-97

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

LPR Enterprises, Inc.,
a Texas corporation,

Plaintiff,

v.

RON LYON,

Defendant.

OCT 06 1997 *PD*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-C-983-K ✓

REPORT AND RECOMMENDATION OF U. S. MAGISTRATE JUDGE

This report and recommendation pertains to Plaintiff's Motion for Default Judgment (Docket #19), Defendant's Response to Motion for Default Judgment (Docket #21), and Plaintiff's Reply to Defendant's Response to Motion for Default Judgment (Docket #22).

Plaintiff argues that this case was filed on October 28, 1996 and Ralph Simon filed an answer and counterclaims on behalf of defendant, but since then has failed to respond to interrogatories and requests for production and to submit witness and exhibit lists pursuant to the court's scheduling order in the case. Defendant and counsel also failed to appear at a July 22, 1997 settlement conference, and when defendant's counsel was summoned by the court, he could not justify his client's failure to participate.

On July 29, 1997, Ralph Simon filed a motion to withdraw as counsel. Plaintiff filed a motion for sanctions and attorney's fees and costs related to defendant's failure to participate in the settlement conference two days later. On July 31, 1997,

the court entered an order granting Ralph Simon leave to withdraw as counsel for defendant and directing defendant to cause new counsel to enter an appearance or file a statement that he wished to proceed *in propria persona* within twenty days. The order admonished defendant that failure to comply might result in the imposition of default judgment or other appropriate sanctions. Defendant has not responded.

Defendant's counsel claims that default against defendant is prohibited under Fed.R.Civ.P. Rule 55(b)(2) because defendant is a temporarily or permanently incompetent person not represented by a guardian or other representative. He was involved in a serious elevator accident in December, 1996, and his physical and mental condition have deteriorated since that accident. Counsel attaches medical records relative to the incident which indicate that defendant's physical injuries were severe and his mental condition has worsened to the point where he cannot care for himself.

A letter from defendant's treating physician dated February 24, 1997 states that he was in a convalescent phase from fractures to his back and leg and on medication which altered his judgment and dulled his senses. A March 10, 1997 letter from his nursing care provider states that he required nursing care and assistance for daily living, transfers, ambulation, medication monitoring, and oversight of his physical therapy regimen. The records show that treatment was last provided on June 3, 1997. Counsel states that defendant's psychologist indicated in late April, 1997 that defendant was suffering from "post traumatic stress" disorder, but attaches no records of psychological treatment. Counsel reports that in conversations

between them, defendant has been unable to speak coherently at times and had difficulty remembering prior conversations. Plaintiff points out that none of the medical records presented by defendant demonstrate his incompetency and that all constitute hearsay.

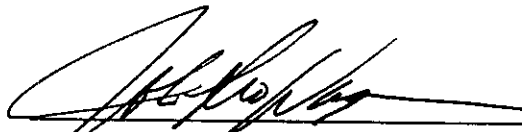
Defendant's counsel points out that defendant participated in the defense of this case and the prosecution of his counterclaims until the accident. Defendant's counsel has participated to the extent he has been able since the accident, even traveling to attend scheduled depositions in May at his own expense. Counsel now has new full-time employment in northeast Kansas and is not able to actively represent defendant in the matter. He argues that it would not be just or fair to grant default judgment to plaintiff now under circumstances where defendant is unable to participate in this matter for no fault of his own.

The Federal Rules of Civil Procedure permit a court to enter a default judgment against a party who fails to obey a court order. Such a judgment must be based on some fault on the part of or binding on the party, and when counsel engages in deliberate, dilatory tactics for a client's benefit a default judgment may be warranted. Smith v. United States, 834 F.2d 166, 171 (10th Cir. 1987).

The court in Ocelot Oil Corp. v. Sparrow Industries, 847 F.2d 1458, 1465 (10th Cir. 1988), set out three factors to determine whether counsel's actions were strategic rather than merely inadvertent. These factors are: degree of actual prejudice to the opposing party; amount of interference with the judicial process; and culpability of the litigant.

The court finds that the entry of default is proper here. Defendant has failed to show incompetence, and no guardian or conservator has been appointed. Nine months have passed since defendant was injured, allowing him adequate time to secure new counsel to defend him in this case. The litigant and his counsel are culpable under the circumstances, and the prejudice to plaintiff and interference with the judicial process has been significant. Plaintiff's Motion for Default Judgment (Docket #19) should be granted.

Dated this 6th day of October, 1997.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 7 Day of October, 1997.

J. Scherette, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT - 6 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CANDACE D. LOY,

Plaintiff,

vs.

JOHN W. LEWIS, an individual, and
ALBERTSON'S, INC., a
Delaware corporation,

Defendants.

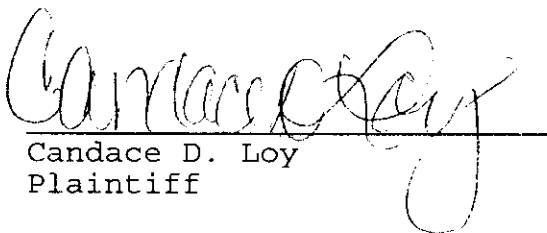
Case No. 97-CV-252-K

ENTERED ON DOCKET

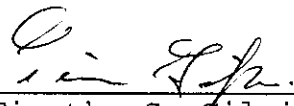
DATE 10-7-97

STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff Candace D. Loy hereby moves this Court to
dismiss its action against Defendant John W. Lewis and Defendant
Albertson's, Inc., with prejudice to any subsequent refiling.



Candace D. Loy
Plaintiff

Respectfully submitted,

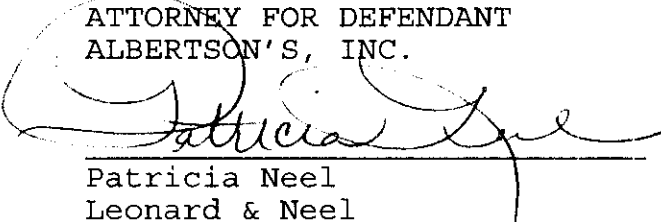

Timothy S. Gilpin, Esq.
1861 E. 15th St.
Tulsa, OK 74104-4610

ATTORNEY FOR PLAINTIFF

APPROVED AS TO FORM AND SUBSTANCE:


Angelyn L. Dale
Nichols, Wolfe, Stamper, Nally,
Fallis & Robertson, Inc.
400 Old City Hall Building
124 East Fourth Street
Tulsa, Oklahoma 74103-5010
(918) 584-5182

ATTORNEY FOR DEFENDANT
ALBERTSON'S, INC.


Patricia Neel
Leonard & Neel
1921 S. Boston Ave.
Tulsa, OK 74119-5221
(918) 583-8700

ATTORNEY FOR DEFENDANT
JOHN W. LEWIS

4915/012/doc/dismissal

FILED

OCT - 6 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE 10-7-97

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JESSE LEE HOWELL,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant/Counterclaim Plaintiff,

v.

DORIS K. HOWELL, DANIEL L.
NICHOLS, and SYDNEY NICHOLS,

Counterclaim Defendants.

FILE

OCT - 6 1997

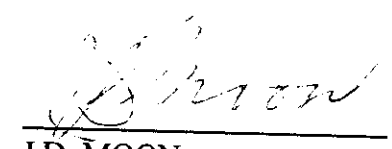
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Case No. 4:92-CV-00081 - K

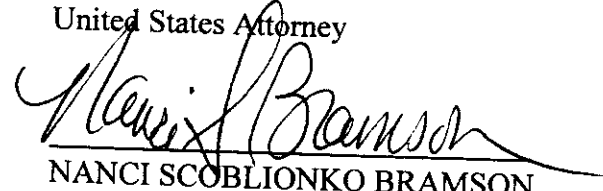
**STIPULATION OF DISMISSAL
PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 41(a)(1)**

Pursuant to Fed. R. Civ. P. 41(a)(1), the plaintiff and defendant/counter claimant stipulate to dismissal with prejudice of the plaintiff's claims for relief against the United States. The plaintiff and defendant/counter claimant further stipulate to the dismissal with prejudice of the United States' counterclaim against the plaintiff pertaining to the taxes assessed against the plaintiff, pursuant 26 U.S.C. §6672, for the third and fourth quarter of 1985 and the first quarter of 1986.

STEPHEN C. LEWIS
United States Attorney


J.D. MOON
7 Colt Square
Suite C

Fayetteville, AR 72703
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NANCI SCOBLIONKO BRAMSON
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mail
C/S
2/24/98

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

STACEY K. PRATT,
SS# 440-64-0864

Plaintiff,

v.

JOHN J. CALLAHAN, Acting Commissioner
of the Social Security Administration,^{1/}

Defendant.

OCT - 7 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 96-C-645-J

ENTERED ON DOCKET

DATE OCT 07 1997

JUDGMENT

This action has come before the Court for consideration and an Order reversing and remanding the case to the Acting Commissioner has been entered. Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 7 day of October 1997.


Sam A. Joyner
United States Magistrate Judge

^{1/} Effective March 1, 1997, President Clinton appointed John J. Callahan to serve as Acting Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), John J. Callahan, Acting Commissioner of Social Security, is substituted for Shirley S. Chater, Commissioner of Social Security, as the Defendant in this action.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

STACEY K. PRATT,
SS# 440-64-0864

Plaintiff,

v.

JOHN J. CALLAHAN, Acting Commissioner
of Social Security Administration,^{1/}

Defendant.

OCT - 7 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 96-C-645-J

ENTERED IN COURT

OCT 07 1997

ORDER^{2/}

Plaintiff, Stacey K. Pratt, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.^{3/} Plaintiff asserts error because (1) the ALJ failed to develop the record and the medical evidence, (2) the ALJ failed to give appropriate weight to the opinions of the treating physician, (3) the ALJ failed to appropriately consider Plaintiff's complaints, and (4) the record contains insufficient support for the ALJ's decision at Step Five of the

^{1/} Effective March 1, 1997, President William J. Clinton appointed John J. Callahan to serve as Acting Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), John J. Callahan, Acting Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

^{2/} This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

^{3/} Plaintiff filed an application for disability and supplemental security insurance benefits on December 17, 1993. [R. at 33-36]. The application was denied initially and upon reconsideration. A hearing before Administrative Law Judge Richard J. Kallsnick (hereafter, "ALJ") was held November 21, 1994. [R. at 458]. By order dated May 4, 1995, the ALJ determined that Plaintiff was not disabled. [R. at 9]. Plaintiff appealed the ALJ's decision to the Appeals Council. On May 10, 1996, the Appeals Council denied Plaintiff's request for review. [R. at 4].

sequential evaluation. For the reasons discussed below, the Court reverses and remands the Commissioner's decision.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born on March 11, 1960. [R. at 203, 462]. Plaintiff has a high school education by completing a GED, and completed one semester of college. [R. at 206].

Plaintiff had a surgical anterior resection for rectal prolapse. In September of 1994, Plaintiff had a total colonoscopy with biopsies. [R. at 390]. Plaintiff alleged that he suffered from rectal prolapse which caused pain, that he had bleeding problems, suffered from fatigue, and had previously broken a finger and hand. Plaintiff also states that he has Hepatitis C.

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.^{4/} See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

^{4/} Step one requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (step five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A).

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

"The finding of the Secretary^{5/} as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

III. THE ALJ'S DECISION

In this case, the ALJ determined that Plaintiff was not disabled at Step Five of the sequential evaluation. The ALJ noted that Plaintiff could not perform his past relevant work, and that Plaintiff should be restricted to doing no more than "light" level work. Due to Plaintiff's rectal difficulties, the ALJ determined that Plaintiff should

^{5/} Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

work within reasonable distance of a restroom. Based on the testimony of a vocational expert, the ALJ concluded that Plaintiff was not disabled.

IV. REVIEW

Failure to Develop the Medical Record

Plaintiff asserts that the ALJ's conclusion that Plaintiff did not suffer any limitations imposed by Hepatitis C is not supported by the record. Plaintiff notes that the ALJ concluded that Plaintiff's diagnosis of Hepatitis C was based solely on "history." and therefore the ALJ failed to accurately review the medical evidence.

Plaintiff is correct that the record contains some evidence that Plaintiff has a form of hepatitis, and/or liver damage. A liver biopsy from December 21, 1994, notes "Hepatitis C by history." The biopsy diagnosis is "mild steatohepatitis."^{6/} The comment provides that "The lymphoid infiltrate in the periportal region typical of Hepatitis C is not present in the current material. Hepatitis C, however, is typically associated with fatty metamorphosis which is prominently displayed in this biopsy. No chronic active hepatitis is demonstrated in that no piecemeal necrosis is seen in periportal tissues. The fatty metamorphosis and centraolobular sclerosis which is associated with this change may be due to dietary factors, preexisting metabolic condition such as diabetes, ethanol consumption^{7/}, or can be idiopathic. There is no evidence of cirrhosis or bridging fibrosis in the current material." [R. at 430].

^{6/} The record is not clear as to what "mild steatohepatitis" is. "Steato" is defined as "prefix meaning fatty." Taber's Cyclopedic Medical Dictionary 1869 (17th ed. 1993). "Hepatitis" is defined as an "inflammation of the liver." Taber's Cyclopedic Medical Dictionary 885 (17th ed. 1993).

^{7/} Plaintiff's medical records reveal a history of alcohol abuse.

Consequently, the record supports the conclusion that Plaintiff has some form of mild hepatitis and/or damage to his liver. However, the relevant inquiry is what limitations are imposed upon Plaintiff which interfere with his ability to work due to his mild hepatitis, not whether or not Plaintiff actually has hepatitis.

Plaintiff was asked, at the hearing, what difficulties his liver caused him. Plaintiff initially answered, "I don't know." [R. at 473]. The ALJ asked Plaintiff what he experienced, and Plaintiff stated that "Well, hard to say because they don't really know that much about Hepatitis C." Plaintiff finally acknowledged that he "gets pains in there." Plaintiff stated that it hurts and causes him pain, and he sometimes lays on his left side. [R. at 430-31].

Plaintiff states that his physician suggested that Plaintiff could be prohibited from working because a work accident which involved active bleeding could expose others to the possibility of infection.

Elaine Mader, M.D., wrote that a "concern is the possibility of infecting other people. Although the main route of transmission of this virus is via blood transfusion or shared needles, transmission to co-workers through exposure to active bleeding should Mr. Pratt have an accident at work, is possible." [R. at 398]. Dr. Mader does not discuss any other limitations which would interfere with Plaintiff's ability to work. Dr. Mader's expressed concern is with potential consequences to others as a result of Plaintiff working.^{8/} Furthermore, Dr. Mader drafted her letter prior to Plaintiff's biopsy,

^{8/} Social security law focuses on whether or not an individual is able to perform the given requirements of a particular job. Of course, as a practical matter, if, given an individual's particular illness, no prospective

and her concerns are "potential" and dependent on "how extensively [Plaintiff's] liver is affected by the virus." [R. at 398]. As noted above, the biopsy indicated that Plaintiff has "mild steatohepatitis." Dr. Mader additionally states that "if [Plaintiff] needs long term treatment for his hepatitis it may be impossible for him to be gainfully employed." [R. at 398]. This statement is, of course, conditional on the need for long term treatment. Nothing in the record indicates that such treatment has been recommended for Plaintiff.

Plaintiff states that, "the ALJ[s] failure to include hepatitis among Mr. Pratt's medically demonstrable impairments simply finds no support in this record." Plaintiff's argument is based on a false premise. Hepatitis is a disease or condition. The relevant inquiry is whether and what limitations are imposed upon Plaintiff due to hepatitis. See, e.g., 20 C.F.R. § 404.1545. The Court concludes that, on the basis of the record, the ALJ did not err by failing to include "hepatitis" in his hypothetical question to the vocational expert.

Plaintiff additionally asserts that the ALJ erred by failing to obtain the reports of Dr. Hale who Plaintiff states was treating him for his hepatitis. Plaintiff was represented by an attorney at the hearing, but did not inform the ALJ of any "missing records" from Dr. Hale, and did not request additional assistance or time to obtain the records. Plaintiff's attorney did state that he could obtain the medical records for Plaintiff's liver biopsy and submit those records within 15 days of the hearing. [R. at

employer would employ the individual, the individual might be considered unemployable (by the vocational expert) and therefore disabled.

473]. Plaintiff submitted additional records (treatment notes from the U.S. Public Health Service Indian Hospital) to the Appeals Council in his appeal to the Appeals Council. [R. at 6]. However, the record does not indicate that Plaintiff attempted to include any additional records from Dr. Hale. Furthermore, Plaintiff does not now suggest that anything in the records from Dr. Hale would have revealed anything more with respect to Plaintiff's condition.

Plaintiff initially indicated that the doctor who had the "latest medical records about [his] disabling condition" was Dr. Mader. [R. at 68]. Plaintiff listed only "John Hackett" in answer to an inquiry regarding any other doctors Plaintiff had seen since his disabling condition began. [R. at 68]. Prior to the hearing before the ALJ Plaintiff was informed, in writing, that he could present any additional medical evidence prior to the hearing. The written notice also stated "[a]lthough you have the responsibility for submitting evidence to support your claim, the people at you [sic] local Social Security office will continue to assist you in obtaining any additional evidence you may wish to submit." [R. at 28]. In addition, Plaintiff was represented by an attorney throughout his hearing and during his appeal to the Appeals Council. Based on the record, the Court cannot conclude that the ALJ erred by failing to further request records from Dr. Hale.

Fatigue

Plaintiff asserts that the ALJ erred by failing to address Plaintiff's complaints of fatigue, and/or including fatigue in the ALJ's credibility assessment. Plaintiff notes that Plaintiff has hepatitis, a mental disorder, and chronic gastrointestinal problems.

Plaintiff states that a limitation of each of these disorders is fatigue, and that the ALJ therefore failed by not conducting a "Luna-type" analysis of Plaintiff's complaints of fatigue. Plaintiff complained of fatigue to his doctors. [R. at 124]. Plaintiff additionally testified that after visiting a doctor it took him two to three days to recover. [R. at 470].

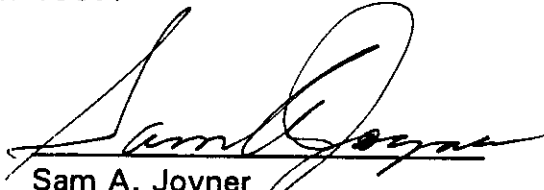
The ALJ provides an assessment of Plaintiff's credibility with respect to Plaintiff's complaints of pain. Plaintiff does not object to the ALJ's pain analysis. However, the ALJ never discusses Plaintiff's subjective complaints of fatigue. In addition, although the ALJ dismisses Plaintiff's claim that he has hepatitis, as noted above, the records indicate that Plaintiff may have some mild form of hepatitis and/or liver damage. In addressing Plaintiff's subjective complaints, the ALJ could either (1) dismiss Plaintiff's complaints of fatigue as not medically linked to hepatitis, a claimed mental impairment, or gastrointestinal complaints (that is, the ALJ could find that no nexus exists), or (2) determine that Plaintiff does not have the alleged impairment(s), or (3) conclude that Plaintiff's complaints were not credible. In this case, the ALJ did not do any of these. Although the record is not replete with either complaints of fatigue by Plaintiff or mentions of fatigue by Plaintiff's doctors, these determinations must be made, initially, at the ALJ level. On remand, the ALJ should address Plaintiff's complaints of fatigue in conjunction with Luna.

Vocational Expert

In the hypothetical question presented to the vocational expert, the ALJ included a requirement that the individual have close access to restroom facilities. Plaintiff complains that he is required to "go to the bathroom all the time." [R. at 471].^{9/} The record indicates that Plaintiff visited the doctor on numerous occasions complaining of rectal difficulties and seepage. The ALJ makes no specific findings with respect to the frequency with which Plaintiff is required to go to the bathroom. On remand, the ALJ should attempt to discern how frequently Plaintiff must visit the restroom and present those limitations to the vocational expert.

Accordingly, the Commissioner's decision is **REVERSED AND REMANDED** for further proceedings consistent with this Order.

Dated this 7 day of October 1997.


Sam A. Joyner
United States Magistrate Judge

^{9/} Plaintiff states that at night he goes to the bathroom only four or five times. [R. at 470].

ENTERED ON DOCKET

DATE 10-7-97

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

WALTER BANKS,

Petitioner,

v.

RON CHAMPION, Warden,

Respondent.

No. 95-C-1074-K ✓

FILED

OCT 03 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Petitioner, a state inmate appearing *pro se*, filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on October 26, 1995. Petitioner challenges his jury conviction of first degree murder in Case No. CRF-79-3393 in the District Court of Tulsa County. Respondent filed a Rule 5 response and supplemental response. Petitioner has replied to both, and additionally, has requested the Court to remand this cause to state court (#19), to appoint counsel (#23), for leave to proceed *in forma pauperis* (#22), and to expedite these proceedings (#24). For the reasons stated below, the Court finds that the State of Oklahoma should grant Petitioner an out-of-time appeal of the December 20, 1994 denial of his application for post-conviction relief by Tulsa County District Court.

I. BACKGROUND

Petitioner and his brother, Anthony Banks, were convicted by a jury of first degree murder in Case No. CRF-79-3393 in the District Court of Tulsa County on February 25, 1981. Anthony received the death penalty, while Petitioner was sentenced to life imprisonment. At trial, Petitioner

was represented by a private attorney while Anthony was represented by court-appointed counsel ^{1/} The brothers appealed their convictions, each represented on appeal by the same attorney from the Tulsa County Public Defender's Office.^{2/} Both convictions were affirmed on appeal.

In 1992, Anthony sought federal habeas corpus relief. On July 18, 1994, the federal district court found Anthony's conviction constitutionally infirm and ordered a retrial by the State of Oklahoma. The federal district court based its decision on findings that Anthony Banks was denied effective assistance of counsel, both at trial and on appeal, and that the State withheld exculpatory evidence. The Tenth Circuit upheld the federal district court's ruling in a published decision, Reynolds v. Banks, 54 F.3d 1508 (10th Cir. 1995). Anthony Banks later entered a plea of guilty and was sentenced to life imprisonment.

The procedural history of Petitioner's case differs significantly from that of Anthony. In September, 1994, after his conviction was affirmed on appeal, see Banks v. State, 728 P.2d 497 (Okla. Crim. App. 1986), Petitioner filed his application for post-conviction relief, alleging ineffective assistance of counsel both at trial and on appeal and the withholding of exculpatory evidence by the State. On December 20, 1994,^{3/} the District Court of Tulsa County denied Petitioner's application, finding the allegations of error procedurally barred even though Petitioner claimed his attorney was ineffective for failing to raise them on direct appeal. The Court held that Petitioner's issues of error could have been raised on appeal but were not. Finding that Petitioner did not state a sufficient

^{1/} Petitioner was represented at trial by Howard Sell; Anthony Banks was represented at trial by Les Earl.

^{2/} On direct appeal, both Anthony and Walter were represented by Steve Lowery.

^{3/} The Order Denying Application for Post-Conviction relief was stamped "FILED" by the Tulsa County Court Clerk on December 22, 1994.

reason for his failure to raise his claims on direct appeal, the court concluded that he had waived the claims.

Thereafter, Petitioner, appearing *pro se*, filed his petition in error with the Oklahoma Court of Criminal Appeals. The state appeals court dismissed Petitioner's appeal on April 14, 1995, stating:

On February 16, 1995, Petitioner appealed to this Court from the December 20, 1994 order of the District Court of Tulsa County denying his application for post-conviction relief in Case No. CRF-79-3393. Thus, the Petitioner failed to file his petition in error within the time provided by law, and this Court is barred from considering the above-styled appeal. Rule 5.2, *Rules of the Court of Criminal Appeals*, 22 O.S. Supp. 1994, Ch. 18, App.

Petitioner subsequently filed this habeas action on October 26, 1995, alleging as grounds for review that he was "a co-defendant with his brother, Anthony Banks, and was exposed to the same situation as Anthony by court-appointed counsel." (#1, at 5). Because Petitioner was represented by the same appellate counsel as Anthony and is relying on the grant of habeas in Anthony's case, Petitioner contends he has presented the "same argument," "the identical circumstances," and "should be enjoined in the same decision." (#1, at 5).

Respondents filed a Response to the petition for writ on December 21, 1995, requesting that the Court dismiss the petition and arguing that consideration of Petitioner's claims by this Court is prohibited by a procedural bar. (#5). Thereafter, pursuant to court order, Respondent supplemented his response (#12) and provided copies of the Tulsa County District Court docket sheet (Ex. A), the jail log from 12/20/94 through 1/20/95 for outgoing mail (Ex. B), the jail log from 12/20/94 through 1/25/94 (sic) for incoming mail (Ex. C), and the Oklahoma Court of Criminal Appeals docket sheet for the relevant case (Ex. D). Respondent concedes that based on the supplemental information, it is unclear when Petitioner received a copy of the Order Denying Application for Post-Conviction

Relief or when Petitioner mailed his Petition in Error, but agrees the Petition in Error was notarized on January 19, 1995 and mailed on January 20, 1995. It is also evident from the docket sheet of the Oklahoma Court of Criminal Appeals that the Petition in Error was not filed by the Court Clerk until February 16, 1995, the same date the docket indicates Petitioner's check was received. Relying on Okla. Stat. tit. 20, § 38, Respondent argues that Petitioner's failure to provide the requisite filing fee simultaneously with the Petition in Error resulted in the procedural bar of Petitioner's post-conviction appeal. Respondent further submits that since Petitioner has not demonstrated the requisite "cause" for his failure to file his petition in error timely, this Court should refuse to consider the merits and dismiss the petition. (#12).

In his Reply, Petitioner admits the state appeals court dismissed his post-conviction appeal for failure to file the petition in error timely. Citing the "mailbox rule" in Houston v. Lack, 487 U.S. 266, 274 (1988), Petitioner states his petition in error was timely filed when he deposited it with prison personnel on January 20, 1995. Furthermore, Petitioner indicates the state appellate court clerk advised that his petition in error "would be retained for 30 days pending timely receipt of an 'Affidavit In Forma Pauperis.'" (#18, at 2). Petitioner requests that this Court "remand" the instant action to the state appellate court. (#19).

II. ANALYSIS

As a preliminary matter, the Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Exhaustion of a federal claim may be accomplished by either (a) showing the state's appellate court had an opportunity to rule on the same claim presented in federal court, or (b) that at the time he filed

his federal petition, he had no available means for pursuing a review of his conviction in state court. White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); see also Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), cert. denied, 475 U.S. 1020 (1986). The exhaustion doctrine is "'principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings.'" Harris v. Champion, 15 F.3d 1538, 1554 (10th Cir. 1994) (quoting Rose v. Lundy, 455 U.S. 509, 518 (1982)).

In this case, Petitioner attempted to present these claims to the Oklahoma Court of Criminal Appeals by submitting a petition in error after the state district court denied his application for post-conviction relief. However, citing Rule 5.2, *Rules of the Court of Criminal Appeals*, 22 O.S. Supp. 1994, Ch. 18, App., the state appellate court dismissed the appeal, effectively imposing a procedural bar on Petitioner's claims.

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state highest court declined to reach the merits of that claim on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 724 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir.), cert. denied, 115 S.Ct. 1972 (1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). "A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. A finding of procedural default is an adequate state ground if it has been applied evenhandedly "in the vast majority of cases." Id. (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991), cert. denied, 502 U.S. 1110 (1992)).

Applying these principles to the instant case, the Court concludes that the state court's procedural bar as applied to Petitioner's claims was an "independent" state ground because "it was the exclusive basis for the state court's holding." Maes, 46 F.3d at 985. Additionally, the procedural bar was an "adequate" state ground because the Oklahoma Court of Criminal Appeals has consistently declined to review claims deemed to be untimely in violation of Rule 5.2, *Rules of the Court of Criminal Appeals*, 22 O.S. Supp. 1994, Ch. 18, App.

Because of his procedural default, this Court may not consider Petitioner's claims unless he is able to show cause and prejudice for the default, or demonstrate that a fundamental miscarriage of justice would result if his claims are not considered. See Coleman, 510 U.S. at 750. The cause standard requires a petitioner to show that "some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

In this case, Petitioner's post-conviction application, which was denied by the trial court, should not have been dismissed by the Oklahoma Court of Criminal Appeals. In its April 14, 1995 Order dismissing the appeal, the state appellate court cited February 16, 1995, the date the Clerk of Court stamped the petition in error, as the date on which Petitioner filed his appeal. However, according to documents supplied by Respondent, Petitioner mailed legal mail to the Oklahoma Court of Criminal Appeals on January 20, 1995. (#12, Ex. B). Thus, Petitioner may have timely filed his

petition in error. Woody v. State, 833 P.2d 257 (Okla. 1992) (holding mailbox rule applicable to determine date of filing pleadings by *pro se* prisoners); Austin v. State, 419 P.2d 569, 573 n.1 (Okla. Crim. App. 1966) (stating that if *pro se* prisoners' pleadings are mailed within the appeal time, they are timely even though not filed with the court clerk until after the appeal time). See also, Houston v. Lack, 487 U.S. 266 (1988) (holding the date of "filing" of a notice of appeal by a *pro se* prisoner is the date he turns over the notice to prison officials for filing). Under Parissi v. Telechron, Inc., 349 U.S. 46, 47 (1955), the Supreme Court held that when the clerk of the district court receives a notice of appeal within the thirty-day filing period, but does not "file" it within that period because the appellant failed to include the filing fee, the notice of appeal is nevertheless timely. See also, Brennan v. United States Gypsum Company, 330 F.2d 728, 729 (10th Cir. 1964). Therefore, Petitioner has established cause for his "untimely" filing, i.e., he turned his legal papers over to the prison mail system for filing.

The Court must now evaluate whether Petitioner was prejudiced by the Oklahoma Court of Criminal Appeals' dismissal of his "untimely" petition in error. In his application for post-conviction relief filed in Tulsa County District Court, Petitioner indicated that his claims included those raised by his brother, Anthony, in his federal habeas action^{4/} and that because Anthony had been afforded habeas relief by the federal district court on those claims, he, Walter, was also entitled to relief. None of these claims was raised by Petitioner in his direct appeal.

^{4/} In Anthony's federal habeas case, the court granted habeas relief on three grounds: (1) that the prosecution had suppressed exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963); (2) that Mr. Banks received ineffective assistance from his trial counsel; and (3) that he received ineffective assistance from his appellate counsel.

If the facts giving rise to Petitioner's claims existed at the time of his direct appeal, then, even assuming his claims had been timely filed, they would have been procedurally barred pursuant to Okla. Stat. tit. 22, § 1086. Issues which Petitioner could have previously raised but did not are deemed waived. Johnson v. State, 823 P.2d 370, 372 (Okla. Crim. App. 1991). The Tenth Circuit has recognized that the Oklahoma Court of Criminal appeals strictly applies Okla. Stat. tit. 22, § 1086 to claims that could have been raised. Odum v. Boone, 62 F.3d 327, 331 (10th Cir. 1995); Steele v. Young, 11 F.3d 1518, 1522-1524 (10th Cir. 1993). Accordingly, if Petitioner could have raised these claims at the time of his direct appeal, then Petitioner was not prejudiced by the Oklahoma Court of Criminal Appeals' decision that Petitioner untimely filed his petition. The Oklahoma Court of Criminal Appeals would have barred review of his claims under Okla. Stat. tit. 22, § 1086, and the invocation of this procedural bar rule would have been an independent and adequate basis for the decision.

However, Petitioner's ineffective assistance of appellate counsel claim may not have been procedurally barred had the Oklahoma Court of Criminal Appeals found the petition in error timely filed. Where an application for post-conviction relief provides the first opportunity for a Petitioner to allege and argue appellate counsel's ineffectiveness, the Oklahoma Court of Criminal Appeals has examined the issue on the merits to determine whether appellate counsel's assistance satisfied the "reasonably effective" standard established in Strickland v. Washington, 466 U.S. 668 (1984). Hooks v. State, 902 P.2d 1120, 1123 (Okla. Crim. App. 1995); see also Conover v. State, 942 P.2d 229 (Okla. Crim. App. 1997). Therefore, Petitioner was prejudiced by the appellate court's dismissal of his petition in error as untimely.

Petitioner has shown cause for his apparent failure to file his petition in error timely. In addition, the Court finds that he was prejudiced by the dismissal of his petition in error. The Court further finds that the State of Oklahoma should be afforded the opportunity to review Petitioner's application for post-conviction relief. Federal courts are vested with the power to control and direct the form of judgment to be entered in habeas corpus cases. Hilton v. Braunskill, 481 U.S. 770. Furthermore, 28 U.S.C. § 2243 provides that a federal court has the power and authority to dispose of habeas corpus matters "as law and justice require." The habeas mandate is broad, Carafas v. La Vallee, 391 U.S. 234 (1968), and the form taken is varied. Levy v. Dillon, 415 F.2d 1263 (10th Cir. 1969). Therefore, the Court finds that Petitioner's "request for order remanding cause to state appellate court for initial decision" (#19) should be granted and the State of Oklahoma should be ordered to grant appellate review of the state district court's denial of Petitioner's application for post-conviction relief.

As to Petitioner's request for appointment of counsel, after carefully reviewing the factual issues involved and the complexity of the legal issues, the Court exercises its discretion to deny Petitioner's motion for appointment of counsel at this time. There is no constitutional right to counsel beyond the direct appeal of a conviction. See Swazo v. Wyoming Department of Corrections, 23 F.3d 332 (10th Cir. 1994). Accordingly, Petitioner's motion for appointment of counsel (docket #23) should be denied.


III. CONCLUSION

Petitioner has demonstrated cause for his procedural default of claims filed in his application for post-conviction relief. In addition, Petitioner was prejudiced by the state appellate court's dismissal of Petitioner's appeal of the district court's denial of the application for post-conviction relief. Therefore, the Court concludes that the State of Oklahoma should be ordered to grant appellate review of the state district court's denial of Petitioner's application for post-conviction relief.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Petitioner's "request for order remanding cause to state appellate court for initial decision" (#19) is **granted**.
2. The petition for writ of habeas corpus is **conditionally granted**. The writ shall issue unless, within sixty (60) days of the entry of this Order, the State of Oklahoma grants Petitioner an out-of-time appeal of the Tulsa County District Court's denial of the application for post-conviction relief, filed December 22, 1994.
3. Petitioner's motion for appointment of counsel (#23) is **denied**.
4. Any and all pending motions are **denied as moot**.

SO ORDERED THIS 3 day of October, 1997.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 10-7-97

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT - 3 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

THE ESTATE OF JOHNNY RAY
ROBBINS, by and through its personal
representative Lisa M. Canady,

Plaintiff,

v.

Case No. 97CV348 K (W)

NOTAMI HOSPITALS OF OKLAHOMA,
INC., an Oklahoma corporation d/b/a
Columbia Tulsa Regional Medical
Center; DR. CHRISTINE GENTRY,
an individual; DR. ROBERT ARCHER,
an individual; DR. JOHN DOE, an
individual; EMERGENCY MEDICAL
SERVICES AUTHORITY, an Oklahoma
public trust; and THE UNITED STATES
OF AMERICA, ex rel. DEPARTMENT
OF VETERANS' AFFAIRS,

Defendants.

**DISMISSAL OF CLAIM FOR VIOLATION OF 42 U.S.C. § 1395dd AGAINST DR.
ROBERT ARCHER**

COMES NOW the Plaintiff, the Estate of Johnny Ray Robbins, by and through its personal representative, Lisa M. Canaday, and dismisses without prejudice only its claim against Dr. Robert Archer for violation of 42 U.S.C. § 1395dd as set forth in Paragraph 10 of Plaintiff's Complaint.

Respectfully submitted,

C. MICHAEL ZACHARIAS

A handwritten signature in black ink, appearing to read "C. Michael Zacharias", written over a horizontal line.

C. Michael Zacharias OBA #9982
Attorney at Law
2642 East 21st Street, Suite 251
Tulsa, OK 74114
(918) 712-1818

Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the _____ day of October 1997, a true and correct copy of the above and foregoing instrument was mailed, with proper postage thereon fully prepaid, to the following:


Don Hopkins
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Attorney for Defendant Gentry

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Attorney for Defendant TRMC

Stephen Lewis, U.S. Attorney
Phil Pinnell, Asst. U.S. Attorney
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Attorneys for Defendant U.S.A.



C. Michael Zacharias

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT - 1 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DONALD E. WEBB, an individual,

Plaintiff,

vs.

MACK BLEVINS, d/b/a
MACK BLEVINS ENTERPRISES,
an individual,

Defendant.

Case No. 96-CV-1106B

ENTERED ON DOCKET

DATE OCT 6 8 1997

ORDER DISMISSING CASE WITH PREJUDICE

NOW, on this 1ST day of ~~September~~ ^{oct.}, 1997, there comes before this Court the Plaintiff and Defendant's Joint Motion for Order Dismissing Case with Prejudice, and the Court, having been fully advised in the premises, finds the relief requested in this pleading should be granted.

IT IS, THEREFORE, HEREBY ORDERED that the instant matter be dismissed with prejudice as to both the Plaintiff's claims against Defendant and Defendant's counterclaims against Plaintiff.

IT IS FURTHER ORDERED that the Stipulation and Protective Order entered herein on July 16, 1997, shall be binding and final as to the parties herein, pursuant to the Settlement Agreement entered into between these parties on the 1ST day of ~~September~~ ^{oct.}, 1997.


United States District Judge

APPROVED AS TO FORM AND CONTENT:

RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS

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TILLY & ASSOCIATES

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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 1 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GLORIA DENISE CURLS,

Plaintiff,

vs.

CHEROKEE NATION,

Defendant.

Case No. 97-CV-370-B

ENTERED ON DOCKET

ORDER

DATE OCT 03 1997

On September 18, 1997, the undersigned directed Plaintiff to show cause why this matter should not be transferred to the Eastern District of Oklahoma (Docket # 7). Within said Order the Court directed Plaintiff's attention to 28 U.S.C. § 1391(b) and 28 U.S.C. § 1404(a).

On September 29, 1997, Plaintiff timely filed a document entitled "SHOW CAUSE" (Docket # 8). Therein, Plaintiff attempts to justify the bringing of this civil rights action in this Court by stating:

- The Northern District of Oklahoma has original jurisdiction over this federal question which must be ruled on first;
- Plaintiff has the right to select the Northern District of Oklahoma because she has property within the Northern District of Oklahoma;
- That Plaintiff strongly objects to the change of venue motion issued by the Cherokee Nation based solely on the fact they reside in the Eastern District of

Oklahoma;¹

- A court where it is convenient for the defendant is not Plaintiff's idea of true justice to which this country was founded by our forefathers;

- That the Northern District of Oklahoma is the logical choice because it is a neutral area where both parties will have an equal opportunity to present their case in an unbiased court, that Plaintiff will receive a fair trial in this District, and the Eastern District of Oklahoma would be advantageous to the Cherokee Nation because they reside therein;

- That there are two competing theories of tribal sovereignty that predate the "discovery" of America by Columbus (Plaintiff does not identify the two theories);

- Indian tribes have only those attributes of sovereignty that Congress allows.

The Court recognizes federal district courts have original jurisdiction over matters involving federal questions, such as this case. See 28 U.S.C. § 1331. Although plaintiffs, at times, have the right to select the forum, the facts of this particular case do not allow Plaintiff unfettered discretion to bring suit where she sees fit. 28 U.S.C. § 1391(b) states:

A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any

¹As of 1 October 1997 the Cherokee Nation had not entered an appearance and the record reflects service has not been obtained on the Cherokee Nation. Further, the Cherokee Nation did not file a motion for change of venue, rather, the Court directed Plaintiff to show cause why venue was proper in this district.

defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

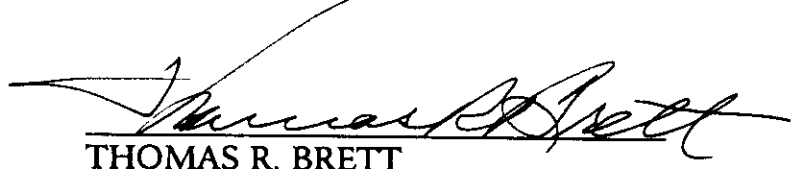
Plaintiff has failed to show venue is appropriate under 28 U.S.C. § 1391(b)(1). The Cherokee Nation is headquartered in Tahlequah, Cherokee County, Oklahoma, which lies within the Eastern District of Oklahoma.

Plaintiff has failed to show venue is appropriate under 28 U.S.C. § 1391(b)(2). Plaintiff has not shown a substantial part of the events or omissions giving rise to her claim occurred in the Northern District of Oklahoma. Plaintiff has also failed to show a substantial part of the property that is the subject of her claim, if any, is located in this district. Plaintiff's statement she has property within the Northern District is irrelevant to a venue analysis.

Finally, as the Eastern District is an appropriate district in which to bring claims against the Cherokee Nation, 28 U.S.C. § 1391(3) is inapplicable.

Venue being inappropriate in the Northern District of Oklahoma, this case is hereby transferred to the United States District Court for the Eastern District of Oklahoma.

IT IS SO ORDERED this 1st day of September, 1997.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT - 2 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
PENNWELL PRINTING COMPANY,)
)
Defendant.)

No. 97-CV-394-B(M)

ENTERED ON DOCKET

DATE OCT 03 1997

JUDGMENT

In keeping with the Order sustaining the motion for summary judgment of the Defendant, PennWell Printing Company, pursuant to Fed.R.Civ.P. 56, Judgment is hereby entered in favor of the Defendant, PennWell Printing Company, and against the Plaintiff, United States of America. Costs of this action are hereby assessed against the Plaintiff if timely applied for pursuant to Local Rule 54.1. The parties are to pay their own respective attorneys fees.

DATED this 2nd day of October, 1997.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D

OCT - 2 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

PENNWELL PRINTING COMPANY,)

Defendant.)

No. 97-CV-394-B (M)

ENTERED ON DOCKET

DATE OCT 02 1997

ORDER

The Court has for decision Plaintiff's and Defendant's respective motions for summary judgment (Docket #12 and #9, respectively) pursuant to Fed.R.Civ.P. 56. In this case the Plaintiff, United States of America, seeks a United States postal revenue deficiency of \$59,188.88, against the Defendant, PennWell Printing Company, for mail matter delivered to the United States Mail for mailing by the Defendant at a lower postal rate than allegedly due.

UNDISPUTED FACTS

1. PennWell Printing Company conducts printing for various publications throughout the country. Two publishers that PennWell Printing Company has done printing for in the past and whose publications are involved herein, are *Angus Journal* and *Limousin World* magazines. Neither of these magazines is owned by PennWell Printing Company. (Funk Affidavit, ¶2).

2. PennWell Printing Company has performed printing for the publication *Angus*

14

Journal since 1991. (Funk Affidavit, ¶3).

3. PennWell Printing Company has performed printing for the publication *Limousin World* since 1995. (Funk Affidavit, ¶4).

4. PennWell Printing Company does not publish any periodicals, magazines or any other kind of publication. (Funk Affidavit, ¶5).

5. In June of 1996, a financial audit was conducted of the recent mailings of PennWell Publishing Company and PennWell Printing Company. (Declaration of Ruth Buchanan).

6. Based on the results of that audit, a revenue deficiency in the amount of \$69,757.84 was assessed on June 14, 1996, against PennWell Publishing and PennWell Printing. (Buchanan Declaration).

7. Of that deficiency, \$44,888.71 was assessed against PennWell Printing as the mailer agency for Angus Productions, Inc., based on several issues of *Angus Journal*, which contained supplements and enclosures which the Plaintiff asserts were not eligible to be mailed at the lower Periodicals rates of postage. (Buchanan Declaration).

8. \$14,300.17 of the deficiency was assessed against PennWell Printing as the mailer for *Limousin World*, Inc., based on several issues of *Limousin World*, which contained enclosures which the Plaintiff asserts were not eligible to be mailed at the lower Periodicals rates of postage. (Buchanan Declaration).

9. The bases for the assessments were mailing of Standard (A) (i.e., third-class) material at the lower Periodicals (i.e., second-class) rate; incorrect mailing of catalogues as

enclosures to Periodical, publications, a supplement that did not contain the required 25% editorial content, and supplements with a 100% advertising content. (Buchanan Declaration).

10. \$9,131.86 was assessed against PennWell Publishing Company for publishing issues of *Offshore*, *Independent Energy* and *Electric Light & Power* with supplements which were not eligible to be mailed at the Periodicals rates of postage. (Buchanan Declaration).

11. The revenue deficiency of PennWell Publishing, in the sum of \$9,131.86, was paid by PennWell Printing Company on April 15, 1997, and reimbursed by PennWell Publishing. The \$9,131.86 sum is no longer an issue in this litigation and PennWell Publishing is no longer a party. (Buchanan Declaration).

12. On June 28, 1996, PennWell Printing appealed the assessment of the revenue deficiency. (Buchanan Declaration).

13. PennWell Printing's appeal was submitted to the Memphis Rates and Classifications Service Center on July 10, 1996, in accordance with applicable postal regulations. (Buchanan Declaration).

14. On September 19, 1996, the Memphis Rates and Classifications Service Center denied PennWell Printing's appeal, finding that the revenue deficiency had been properly assessed and was due and owing to the Postal Service. (Buchanan Declaration).

15. At PennWell Printing's insistence, the file was sent on October 29, 1996, to the Business Mail Acceptance office in Washington, D.C. (Buchanan Declaration).

16. On November 7, 1996, the Business Mail Acceptance office notified PennWell

Printing that it did not have any authority to reverse the decision of the Memphis Rates and Classification Service Center and took no action in regard thereto. The Memphis Rates and Classification Service Center ruling was the final agency ruling. (Buchanan Declaration).

17. PennWell Printing has exhausted its administrative remedies. Three issues were raised or presented by PennWell Printing administratively. They were: (1) whether PennWell Printing could be legally responsible for the subject revenue deficiencies; (2) waiver and estoppel; and (3) that a supplement did contain the required 25% editorial content to qualify at the lower Periodicals rate. PennWell Printing did not contest administratively the alleged incorrect mailing of catalogues or the supplements with 100% advertising content. (Defendant's Counsel's Admission at the September 17, 1977 Hearing).

18. The only currently disputed postage deficiency contained in the Certificate of Indebtedness relates to amounts owed by *Angus Journal* and *Limousin World*, \$44,888.71 and \$14,300.17, respectively, as reflected in tabs 1 and 2 of the Certificate of Indebtedness.¹ (Funk Affidavit, ¶7).

19. Both *Angus Journal* and *Limousin World* magazines maintain accounts with the United States Postal Service for the purpose of paying for postage. (Funk Affidavit, ¶8).

20. *Angus Journal* maintains a postage account with the Postal Service known as USPS No. 003-320. (Funk Affidavit, ¶9).

¹The record does not reflect what company paid the base periodical rate. The only reasonable assumption is it was paid from the established postal accounts of *Angus Journal* and *Limousin World*, respectively.

21. *Limousin World* maintains a postage account with the Postal Service known as USPS No. 725-990. (Funk Affidavit, ¶10).

22. All postage paid by *Angus Journal* and *Limousin World* are deducted from the above specified accounts that *Angus Journal* and *Limousin World* have with the Postal Service. PennWell Printing Company has never paid for the postage of *Angus Journal* or *Limousin World*. (Funk Affidavit, ¶13).

23. PennWell Publishing Company does not have an account with the United States Postal Service relating to periodical class mailings. (Funk Affidavit, ¶14).

24. PennWell Printing Company does not pay for the postage relating to magazines which it prints. Instead, as a matter of convenience and to save bulk shipping costs, PennWell Printing Company delivers the magazines to the local Tulsa, Oklahoma postal service location for mailing. (Funk Affidavit, ¶15). This service is with the knowledge and approval of *Angus Journal* and *Limousin World*, respectively, PennWell Printing's clients.

25. PennWell Printing Company has never agreed, orally or in writing, to assume the liability for postage due for *Angus Journal* or *Limousin World* magazines. (Funk Affidavit, ¶16).

26. PennWell Printing Company has never agreed, either orally or in writing, with the United States Postal Service to pay for the liability for postage relating to *Angus Journal* and *Limousin World* magazines.² (Funk Affidavit, 17).

²For reasons known only to Plaintiff and Defendant, neither has chosen to include the principals, *Angus Journal* or *Limousin World*, as a party in this litigation.

The Standard of Fed.R.Civ.P. 56
Motion for Summary Judgment

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Windon Third Oil & Gas v. FDIC*, 805 F.2d 342, 345 (10th Cir. 1986). In *Celotex*, the Supreme Court stated:

[t]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts sufficient to raise a "genuine issue of material fact." *Anderson*, 477 U.S. at 247-48.

The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita v. Zenith*, 475 U.S. 574, 585 (1986).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient

disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Anderson*, 477 U.S. at 250. In its review, the Court must construe the evidence and inferences therefrom in a light most favorable to the nonmoving party. *Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1521 (10th Cir. 992).

Legal Analysis and Conclusion

The Postal Service is authorized to establish classes of mail and postage rates and fees in accordance with specific statutory procedures. 39 U.S.C. §§ 403(a), 3621 *et seq.* The Postal Service is empowered to prescribe the amount of postage on mailings and the manner in which it is to be paid; to provide for evidence of postage payments; to adopt, amend, and repeal regulations necessary to accomplish the objectives of Title 39; and to have all other powers incidental, necessary or appropriate to the exercise of its duties. 39 U.S.C. §§ 401(2), 401(10), 404(a)(2), 404(a)(4).

Generally there are four distinct classifications of mail, which are currently denominated as First-Class, Periodicals, Standard Mail (A) and Standard Mail (B). The instant matter concerns Periodicals (formerly second class) mail, which has historically been reserved solely for newspapers and periodicals meeting prescribed eligibility criteria. See former 39 U.S.C. §4351. Periodical rates offer publishers lower rates and faster service than the practical alternatives, Standard Mail (A) and (B).

Publications must be authorized by the Postal Service before they can be entered at Periodical rates. Postal rules do not allow the entry of unqualified matter at the Periodicals

rates notwithstanding that they are attached to or enclosed with publications entitled to use those rates. Unqualified matter accompanying otherwise approved periodicals must pay the appropriate Standard Mail (A) or First-Class rates on the unqualified matter. Domestic Mail Manual ("DMM") Section C200.1.3. There are special regulations dealing with the subject of "Catalog" not being eligible for Periodical rates. DMM Section C200.2.2(b). Another regulation deals with the subject of an unbound supplement containing at least 25% non-advertising matter in order to be mailed at Periodical rates. DMM Section C200.1.5(a).

Generally, postage must be prepaid on mailings at the time of entry. DMCS Section 3000.010; DMM Section P011.1.1. However, there are instances in which mail is entered without the payment of full postage, and the Postal Service has promulgated procedures for the recovery of the unpaid postage, known as "revenue deficiencies." DMM Section P011.4.0. The postmaster of the office where the mail was deposited issues the initial decision assessing the revenue deficiency. DMM Section P011.4.1. The postmaster's decision may be appealed to the Rates and Classification Service Center (RCSC) serving the area from which the initial decision was issued. The RCSC decision is a final agency decision. DMM Section P011.4.2. The RCSC role is limited to consideration of mail classification issues. It is not responsible for settlement or other collection issues which are the responsibility of the district finance officials. The administrative exhaustion procedure has been concluded as stated above and the revenue deficiency was assessed against PennWell Printing Company.

The pertinent Domestic Mail Manual (DMM) sections urged by the Plaintiff to

impose liability on the Defendant herein are:

P200 Periodicals

Responsibility

- 1.3 The mailer is responsible for proper payment of postage. Postage must be fully prepaid before Periodicals mailings are dispatched. The publisher must ensure that all information on postage statements is correct and that all copies qualify for the rates claimed.

G020 Mailing Standards

2.0 Mailer Compliance With Standards

Mailer Responsibility

- 2.1 A mailer must comply with all applicable postal standards. Despite any statement in this document or by any USPS employee, the burden rests with the mailer to comply with the laws and standards governing domestic mail. * *

P011.4.0 Revenue Deficiency - General

Ruling

- 4.1 Revenue deficiency means insufficient payment by a mailer or other postal customer of postage or fees. The postmaster renders the initial ruling to the customer, citing the amount of the deficiency and the circumstances.

P011.5.0 Revenue Deficiency - Nonprofit Standard Mail

Assessment and Appeal

- 5.1 A revenue deficiency may be assessed in the amount of the unpaid postage against any person or organization that mailed, or caused to be mailed, ineligible matter at the Nonprofit Standard Mail rates in violation of E670.

D200 Periodicals

D210 Basic Information

2.0 Mail Deposit

Only a publisher or registered news agent authorized Periodicals mailing privileges may mail at the Periodicals rates. * *

The Domestic Mail Manual (DMM) is codified and incorporated by reference into Title 39 of the Code of Federal Regulations. 39 C.F.R. Ch. 1 (7-1-96 Ed.). It is settled that

a postal regulation such as the DMM, when correctly promulgated and incorporated by reference in the Federal Register, has the force and effect of law. *Modern Systems Technology Corp. v. United States*, 979 F.2d 200, 202 (Fed. Cir. 1992), and *DeMatteo Construction Co. v. United States*, 220 Ct.Cl. 579, 591, 600 F.2d 1384, 1391 (1979). Parties that use the United States Mails are charged with knowledge of existing applicable mail regulations. *Paulson v. Greyhound Lines, Inc.*, 628 F. Supp. 888 (D.Minn. 1986), *aff'd*, 804 F.2d 506 (8th Cir. 1986)(shipper presumed to know terms of properly published tariff of interstate carrier); *United States v. Cannistraro*, 694 F. Supp. 62, 75 (D.N.J. 1988), *rev'd on other grounds*, 871 F.2d 1210 (3d Cir.1989)(defendant had constructive notice of applicable local rule pertaining to posting bond); *Durant v. United States*, 16 Cl.Ct. 447, 451 (1988)(participant in Agriculture Stabilization and Conservation Program charged with knowledge of applicable regulations).

In this analysis it is well to keep in mind we are dealing with mail matter published by entities, *Angus Journal* and *Limousin World*, that maintain open accounts for their mailings with the United States Postal Service.

The issues presented herein are as follows: (1) Under existing regulations and the facts, is PennWell Printing Company legally responsible for the subject assessed mail revenue deficiency (PennWell Printing is neither the publisher nor owner of the mail matter but did physically deliver it to the postal authorities to be mailed); (2) does waiver or estoppel apply by reason of prior approval by an authorized postal authority; and (3) was unqualified mail matter mailed at the Periodicals rate that should have been mailed at the

appropriate higher rate?

Plaintiff argues PennWell Printing Company qualifies as a "mailer" under the regulations so PennWell Printing is legally responsible for the subject revenue deficiency. There is no definition of "mailer" in the DMM and the parties agree there is no case precedent interpreting the term "mailer." If the court concludes the DMM regulations are lacking in clarity to place PennWell Printing on notice of its postage obligation herein, issues (2) and (3) above are moot.

Plaintiff states in its brief (Memorandum in Support of Plaintiff's Reply filed August 25, 1997, p. 4) that dictionary definitions of "mailer" state:

One who or that which mails; one who prepares mail for the post.
Webster's New International Dictionary (2nd Ed. 1954)

A person who mails or prepares material for mailing. The Random
House College Dictionary, 806 (1973).

The Court notes the Webster's Third New International Dictionary (1976) defines "mailer" as follows:

Mailer 1a: A user of the mails; b: one who addresses and otherwise prepares material that is to be mailed; 2 archaic: A boat that carries mail; 3: mailing machine; 4a: a container for mailing something in, b: an advertising leaflet for enclosure with letter mail.

Other current dictionaries have been examined by the court that do not define "mailer" at all. The Plaintiff argues that the term "mailer" is broad enough to include both the publisher of the mail matter that desires it be sent by United States Mail (*Angus Journal* and *Limousin World*) and also the party that actually delivers the mail matter to the postal authorities to be

mailed (PennWell Printing).

As pointed out by Plaintiff in its principal brief, the standard of review to be applied to a Postal Service decision is governed by common law principles of reviewability because the Postal Service is exempt from the Administrative Procedure Act (APA), 5 U.S.C. §701 *et seq.* 39 U.S.C. §410(a); *Peoples Gas, Light and Coke Co. v. United States Postal Service*, 658 F.2d 1182, 1191 (7th Cir. 1981); *Harrison v. United States Postal Service*, 840 F.2d 1149, 1155-56 (4th Cir. 1988) (listing cases applying common law review).

The starting point is the statutory language and implementing regulations. *Consumer Products Safety Commission v. G.T.E. Sylvania, Inc.*, 447 U.S. 102, 108 (1980), *United States v. Trident Seafoods Corporation*, 60 F.3d 556, 558 (9th Cir. 1995). The court does not see this matter as one where “limpid prose puts an end to all dispute.” *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 45, 57 (1987).

PennWell Printing argues that to impose liability upon it is to make PennWell Printing legally responsible for a contract in which it was not a party. Defendant states this is a constitutional violation - taking property without just compensation.

Until this dispute, the term “mailer” has not been given an official interpretation by the United States postal authorities. The court concludes the term “mailer” is ambiguous because it could include the party actually causing the mailing to be prepared, as well as the party that actually delivers the mail to a post office. Conceivably, it might even include the party that caused mailing labels to be attached or placed the matter in containers or pouches for mailing. A more reasonable interpretation of the term “mailer” as it applies to the DMM,

would apply to the party ultimately responsible for placement of the mailing, whether or not that party actually delivered the mail to the post office.

Due process requires that a party receive fair notice before being deprived of property. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

A high level of deference is usually given to an agency's own interpretation of its regulations. *See, Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984); *United States v. Larionoff*, 431 U.S. 864, 872 (1977); and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

The deference rule is not absolute, however. A court need not accept an agency's interpretation of its own regulations if the interpretation is “ ‘unreasonable, plainly erroneous, or inconsistent with the regulation's plain meaning.’ ” *Lewis v. Babbitt*, 998 F.2d 880, 882 (10th Cir. 1993) (quoting *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 738 (10th Cir. 1993)). *Culbertson v. United States Department of Agriculture*, 69 F.3d 465, 467 (10th Cir. 1995).

“When the administrative interpretation is not based on expertise in the particular field, . . . but is based on general common law principles, great deference is not required.” *Jicarilla Apache Tribe v. Federal Energy Regulatory Commission*, 578 F.2d 289, 292-293 (10th Cir. 1978).

Section 6.10 of the Administrative Law Treatise states:

Rules are supposed to serve the valuable function of making clear the often vague, conflicting, and ambiguous language in an agency-administered statute.

Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.10 at 124 (3d

ed. 1996 Supp.). The treatise emphasizes rules should not simply transform statutory vagueness into regulatory vagueness, leaving the public with no means of ascertaining the meaning of the agency's rules until they are applied in each case, leaving the agency with unconstrained discretion to determine the real rules applicable to the particular conduct *ad hoc* long after the conduct has occurred.

The due process clause prohibits deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires. *General Electric Company v. E.P.A.*, 53 F.3d 1324, 1328-29 (D.C.Cir. 1995), and *Gates & Fox v. OSHRC*, 790 F.2d 154, 156 (D.C.Cir. 1986). Where the regulation is not sufficiently clear to give proper notice to a party about what is expected of it, an agency may not deprive a party of property by imposing civil or criminal liability.

If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with "ascertainable certainty," the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation. *See, Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976).

General Electric Company, 53 F.3d at 1329.

The government agency has an obligation to promulgate clear and definitive regulations. "No deference is owed when an agency has not formulated an official interpretation of its regulation, but is merely advancing a litigation position." *Trident Seafoods Corp.*, 60 F.3d at 559; *Hines v. United States*, 60 F.3d 1442, 1449 (9th Cir. 1995).

The court concludes the Plaintiff, the United States Postal Service, has employed the

term "mailer," which is unclear and not adequately defined, to impose civil liability on PennWell Printing herein for the subject revenue deficiency under the facts and circumstances. To impose civil liability upon one acting solely as a delivery boy of mail matter for a publisher maintaining an open account with the United States Postal Service, the regulation should be clear and free of ambiguity. The term "mailer" lacks such clarity and definition.

Therefore, Defendant's motion for summary judgment is hereby sustained and Plaintiff's motion for summary judgment is hereby overruled.

A separate Judgment in keeping with the court's conclusions herein shall be entered this date.

IT IS HEREBY SO ORDERED this 2nd day of October, 1997.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 10-3-97

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

OCT - 2 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,
on behalf of the Secretary of Veterans Affairs,

Plaintiff,

v.

PHILLIP A. BEATY
aka Phillip Anthony Beaty aka Phillip Beaty, et al.,

Defendants.

CIVIL ACTION NO. 96-CV-1195-H

CLERK'S ENTRY OF DEFAULT

It appearing from the files and records of this Court as of Oct 2 1997 and the declaration of Phil Pinnell, Assistant United States Attorney, that the Defendants, Phillip A. Beaty aka Phillip Anthony Beaty aka Phillip Beaty; The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Cheryl Beaty aka Cheryl R. Beaty aka Cheryl Roberta Beaty, Deceased; Robert Beaty; and Anthony Beaty, against whom judgment for affirmative relief is sought in this action have failed to plead or otherwise defend as provided by the Federal Rules of Civil Procedure; now, therefore,

I, PHIL LOMBARDI, Clerk of said Court, pursuant to the requirements of Rule 55(a) of said rules, do hereby enter the default of said defendants.

Dated at Tulsa, Oklahoma, this 2 day of Oct, 1997.

PHIL LOMBARDI, Clerk
United States District Court for
the Northern District of Oklahoma

By A. Schaefer
Deputy

Clerk's Entry Of Default
Case No. 96-CV-1195-H (Beaty)

PP:cms

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 30 1997

DAVID B. McDERMOTT, II,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

et al.,

Defendants.

Case No. 96-CV-313-B

("Base File")

Phil Lombardi, Clerk
U.S. DISTRICT COURT

96-CV-314-B, 96-CV-315-B, 96-CV-316-H,

96-CV-320-H, 96-CV-321-H, 96-CV-322-B,

96-CV-323-K, 96-CV-367-C, 96-CV-368-H,

96-CV-369-B, 96-CV-370-B, 96-CV-371-BU,

96-CV-404-H, 96-CV-405-BU, 96-CV-406-E,

96-CV-407-K, 96-CV-408-B, 96-CV-409-H,

96-CV-410-E, 96-CV-411-H, 96-CV-412-BU,

96-CV-413-K

ENTERED ON DOCKET

ORDER

DATE 10-2-97

In January of 1996, Plaintiff, a federal prisoner appearing *pro se*, began filing weekly motions in his criminal case (93-CR-163-E) complaining of conditions at the Tulsa County Jail (TJC) where he was being held as a pre-trial detainee. On April 4, 1996, Judge Ellison entered an Order in Plaintiff's criminal case which stated as follows:

The claims raised in the above pleadings [docket #208, #210, #211, #213, #214, #216, #217, #223, #225, #226, #228, #229, #230, #238, #239, #240, #242, #247, #251, #252, #253, and #254] challenge the conditions of McDermott's confinement at the Tulsa County Jail, and relate only marginally to his criminal case. Therefore, the Court can more appropriately address these claims in a separate civil rights action.

Accordingly, the Clerk shall OPEN separate civil rights actions for each of the above numbered pleadings and list the Tulsa County Jail and Sheriff Stanley Glanz as defendants. The Court will consolidate some of the individual actions after filing.

The Clerk's office opened twenty-three civil rights cases for Plaintiff. Originally, all of the cases dealing primarily with Plaintiff's complaints concerning the denial of his right to access a law library (case nos. 96-CV-313-B, 96-CV-314-B, 96-CV-315-B, 96-CV-316-H, 96-CV-321-H, 96-CV-322-B, 96-CV-369-B, 96-CV-370-B, 96-CV-371-BU, 96-CV-405-BU, 96-CV-408-B, 96-CV-410-E,

96-CV-413-K) were consolidated with 96-CV-313-B as the "Base File." All of the cases dealing primarily with Plaintiff's complaints concerning the conditions of confinement at TCJ (case nos. 96-CV-320-H, 96-CV-323-K, 96-CV-368-H, 96-CV-404-H, 96-CV-406-E, 96-CV-407-K, 96-CV-409-H, 96-CV-411-H, and 96-CV-412-BU) were consolidated with 96-CV-320-H as the "Base File." One remaining case, 96-CV-367-C, dealt primarily with Plaintiff's medical claims. Ultimately, on November 27, 1996, case nos. 96-CV-313-B, 96-CV-320-H, and 96-CV-367-C were consolidated with 96-CV-313-B as the "Base File." In other words, each of the twenty-three separate civil rights filings has been consolidated with the instant case, 96-CV-313-B.

By the terms of an Order filed August 20, 1996, this Court granted Plaintiff's motions to proceed *in forma pauperis* and to amend his complaint. Plaintiff was to amend within fifteen (15) days to cure certain deficiencies specified in the Order and he was provided copies of the court-approved form for the purpose of amending his complaint. Subsequent to the entry of that Order, Plaintiff was transferred to different institutions and sought several extensions of time within which to file his amended complaint in compliance with the Court's Order of August 20, 1996.

On February 18, 1997, Plaintiff submitted his "amended civil rights complaint in behalf of David B. McDermott, II" (Docket #21). Prior to filing his amended complaint, Plaintiff requested extensions of time (Docket #s 18, 19 and 20). As Plaintiff has now filed his amended complaint, the Court finds that the requests for additional time are moot.

In the August 20, 1996 Order, the Court advised Plaintiff that his complaint would be screened for frivolity. Specifically, Plaintiff was advised that his claims for monetary damages against the United States of America were barred by sovereign immunity, that Plaintiff's claims would be barred unless he indicated that he had exhausted his administrative remedies, and that his claims

against Stanley Glanz, Tulsa County Sheriff, would be dismissed for failure to state a claim unless Plaintiff alleged that Glanz caused or participated in the alleged constitutional deprivation. The August 20, 1996 Order specifically stated that "[t]his action will be dismissed as frivolous or for failure to state a claim upon which relief can be granted unless Plaintiff files a second amended complaint . . . curing the deficiencies noted in this order." Also, the Clerk of Court sent Plaintiff a blank civil rights complaint form labeled "second amended complaint." However, Plaintiff failed to submit his amended complaint on the court-approved form.

After reviewing Plaintiff's amended civil rights complaint, the Court finds that Plaintiff again failed to submit his amended complaint on the court-approved form.¹ In addition, Plaintiff failed to cure all of the deficiencies specified in the August 20, 1996 Order. Specifically, he continues to seek monetary damages from the United States of America, fails to allege that Defendant Glanz caused or participated in the alleged constitutional deprivations, and fails to identify specific defendants who did cause or participate in the alleged constitutional deprivations. Therefore, the Court finds that Plaintiff's "amended civil rights complaint" should be dismissed without prejudice as frivolous, for failure to state a claim upon which relief can be granted and for failure to comply with this Court's August 20, 1996 Order.

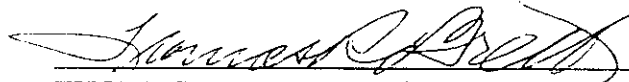
Each of Plaintiff's twenty-three (23) cases was consolidated for disposition with this case, 96-CV-313-B, as the "Base File." The dismissal of this case serves to terminate each of the associated cases. The Clerk of Court is directed to file a copy of this Order in each of the associated cases.

¹According to N.D. LR 9.3(A), "[a]ll petitions for writ of habeas corpus, motions, and civil rights complaints shall be on the applicable form and shall comply with the Local Rules and Information and Instructions."

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. This case is **dismissed without prejudice** at this time. The Court may reopen Plaintiff's action if he submits to the Court, within thirty (30) days of the date of this Order, an amended petition prepared on the Court-approved form, along with the requisite number of copies, summons and Marshal forms, all in full compliance with the Information and Instructions for Filing Complaints under 42 U.S.C. § 1983 and N.D. LR 9.3(A).
2. Any and all pending motions are **moot**.
3. For purposes of counting "prior occasions" under 28 U.S.C. § 1915(g), the Clerk of the Court is directed to **"flag"** this as a dismissal pursuant to 28 U.S.C. § 1915A(b).

SO ORDERED THIS 29th day of Sept., 1997.



THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 30 1997

DAVID B. McDERMOTT, II,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
et al.,

Defendants.

Case No. 96-CV-313-B

("Base File")

Phil Lombardi, Clerk
U.S. DISTRICT COURT

96-CV-314-B, 96-CV-315-B, 96-CV-316-H,
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96-CV-413-K

ENTERED ON DOCKET

ORDER

DATE 10-2-97

In January of 1996, Plaintiff, a federal prisoner appearing *pro se*, began filing weekly motions in his criminal case (93-CR-163-E) complaining of conditions at the Tulsa County Jail (TJC) where he was being held as a pre-trial detainee. On April 4, 1996, Judge Ellison entered an Order in Plaintiff's criminal case which stated as follows:

The claims raised in the above pleadings [docket #208, #210, #211, #213, #214, #216, #217, #223, #225, #226, #228, #229, #230, #238, #239, #240, #242, #247, #251, #252, #253, and #254] challenge the conditions of McDermott's confinement at the Tulsa County Jail, and relate only marginally to his criminal case. Therefore, the Court can more appropriately address these claims in a separate civil rights action.

Accordingly, the Clerk shall OPEN separate civil rights actions for each of the above numbered pleadings and list the Tulsa County Jail and Sheriff Stanley Glanz as defendants. The Court will consolidate some of the individual actions after filing.

The Clerk's office opened twenty-three civil rights cases for Plaintiff. Originally, all of the cases dealing primarily with Plaintiff's complaints concerning the denial of his right to access a law library (case nos. 96-CV-313-B, 96-CV-314-B, 96-CV-315-B, 96-CV-316-H, 96-CV-321-H, 96-CV-322-B, 96-CV-369-B, 96-CV-370-B, 96-CV-371-BU, 96-CV-405-BU, 96-CV-408-B, 96-CV-410-E,

96-CV-413-K) were consolidated with 96-CV-313-B as the "Base File." All of the cases dealing primarily with Plaintiff's complaints concerning the conditions of confinement at TCJ (case nos. 96-CV-320-H, 96-CV-323-K, 96-CV-368-H, 96-CV-404-H, 96-CV-406-E, 96-CV-407-K, 96-CV-409-H, 96-CV-411-H, and 96-CV-412-BU) were consolidated with 96-CV-320-H as the "Base File." One remaining case, 96-CV-367-C, dealt primarily with Plaintiff's medical claims. Ultimately, on November 27, 1996, case nos. 96-CV-313-B, 96-CV-320-H, and 96-CV-367-C were consolidated with 96-CV-313-B as the "Base File." In other words, each of the twenty-three separate civil rights filings has been consolidated with the instant case, 96-CV-313-B.

By the terms of an Order filed August 20, 1996, this Court granted Plaintiff's motions to proceed *in forma pauperis* and to amend his complaint. Plaintiff was to amend within fifteen (15) days to cure certain deficiencies specified in the Order and he was provided copies of the court-approved form for the purpose of amending his complaint. Subsequent to the entry of that Order, Plaintiff was transferred to different institutions and sought several extensions of time within which to file his amended complaint in compliance with the Court's Order of August 20, 1996.

On February 18, 1997, Plaintiff submitted his "amended civil rights complaint in behalf of David B. McDermott, II" (Docket #21). Prior to filing his amended complaint, Plaintiff requested extensions of time (Docket #s 18, 19 and 20). As Plaintiff has now filed his amended complaint, the Court finds that the requests for additional time are moot.

In the August 20, 1996 Order, the Court advised Plaintiff that his complaint would be screened for frivolity. Specifically, Plaintiff was advised that his claims for monetary damages against the United States of America were barred by sovereign immunity, that Plaintiff's claims would be barred unless he indicated that he had exhausted his administrative remedies, and that his claims

against Stanley Glanz, Tulsa County Sheriff, would be dismissed for failure to state a claim unless Plaintiff alleged that Glanz caused or participated in the alleged constitutional deprivation. The August 20, 1996 Order specifically stated that "[t]his action will be dismissed as frivolous or for failure to state a claim upon which relief can be granted unless Plaintiff files a second amended complaint . . . curing the deficiencies noted in this order." Also, the Clerk of Court sent Plaintiff a blank civil rights complaint form labeled "second amended complaint." However, Plaintiff failed to submit his amended complaint on the court-approved form.

After reviewing Plaintiff's amended civil rights complaint, the Court finds that Plaintiff again failed to submit his amended complaint on the court-approved form.¹ In addition, Plaintiff failed to cure all of the deficiencies specified in the August 20, 1996 Order. Specifically, he continues to seek monetary damages from the United States of America, fails to allege that Defendant Glanz caused or participated in the alleged constitutional deprivations, and fails to identify specific defendants who did cause or participate in the alleged constitutional deprivations. Therefore, the Court finds that Plaintiff's "amended civil rights complaint" should be dismissed without prejudice as frivolous, for failure to state a claim upon which relief can be granted and for failure to comply with this Court's August 20, 1996 Order.

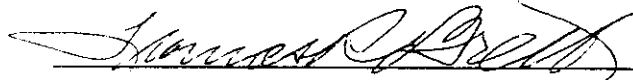
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¹According to N.D. LR 9.3(A), "[a]ll petitions for writ of habeas corpus, motions, and civil rights complaints shall be on the applicable form and shall comply with the Local Rules and Information and Instructions."

ACCORDINGLY, IT IS HEREBY ORDERED that:

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SO ORDERED THIS 29th day of Sept., 1997.



THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 30 1997 *JD*

DAVID B. McDERMOTT, II,)

Plaintiff,)

vs.)

THE UNITED STATES OF AMERICA,
et al.,)

Defendants.)

Case No. 96-CV-313-B

("Base File")

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Phil Lombardi, Clerk
U.S. District Court

ENTERED ON DOCKET

ORDER

DATE 10-2-97

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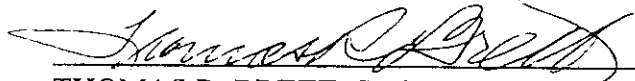
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¹According to N.D. LR 9.3(A), "[a]ll petitions for writ of habeas corpus, motions, and civil rights complaints shall be on the applicable form and shall comply with the Local Rules and Information and Instructions."

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. This case is **dismissed without prejudice** at this time. The Court may reopen Plaintiff's action if he submits to the Court, within thirty (30) days of the date of this Order, an amended petition prepared on the Court-approved form, along with the requisite number of copies, summons and Marshal forms, all in full compliance with the Information and Instructions for Filing Complaints under 42 U.S.C. § 1983 and N.D. LR 9.3(A).
2. Any and all pending motions are **moot**.
3. For purposes of counting "prior occasions" under 28 U.S.C. § 1915(g), the Clerk of the Court is directed to **"flag"** this as a dismissal pursuant to 28 U.S.C. § 1915A(b).

SO ORDERED THIS 29th day of Sept., 1997.



THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 30 1997

DAVID B. McDERMOTT, II,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
et al.,

Defendants.

Case No. 96-CV-313-B

("Base File")

Phil Lombardi, Clerk
U.S. DISTRICT COURT

96-CV-314-B, 96-CV-315-B, 96-CV-316-H,

96-CV-320-H, 96-CV-321-H, 96-CV-322-B,

96-CV-323-K, 96-CV-367-C, 96-CV-368-H,

96-CV-369-B, 96-CV-370-B, 96-CV-371-BU,

96-CV-404-H, 96-CV-405-BU, 96-CV-406-E,

96-CV-407-K, 96-CV-408-B, 96-CV-409-H,

✓ 96-CV-410-E, 96-CV-411-H, 96-CV-412-BU,

96-CV-413-K

ENTERED ON DOCKET

DATE 10-2-97

ORDER

In January of 1996, Plaintiff, a federal prisoner appearing *pro se*, began filing weekly motions in his criminal case (93-CR-163-E) complaining of conditions at the Tulsa County Jail (TJC) where he was being held as a pre-trial detainee. On April 4, 1996, Judge Ellison entered an Order in Plaintiff's criminal case which stated as follows:

The claims raised in the above pleadings [docket #208, #210, #211, #213, #214, #216, #217, #223, #225, #226, #228, #229, #230, #238, #239, #240, #242, #247, #251, #252, #253, and #254] challenge the conditions of McDermott's confinement at the Tulsa County Jail, and relate only marginally to his criminal case. Therefore, the Court can more appropriately address these claims in a separate civil rights action.

Accordingly, the Clerk shall OPEN separate civil rights actions for each of the above numbered pleadings and list the Tulsa County Jail and Sheriff Stanley Glanz as defendants. The Court will consolidate some of the individual actions after filing.

The Clerk's office opened twenty-three civil rights cases for Plaintiff. Originally, all of the cases dealing primarily with Plaintiff's complaints concerning the denial of his right to access a law library (case nos. 96-CV-313-B, 96-CV-314-B, 96-CV-315-B, 96-CV-316-H, 96-CV-321-H, 96-CV-322-B, 96-CV-369-B, 96-CV-370-B, 96-CV-371-BU, 96-CV-405-BU, 96-CV-408-B, 96-CV-410-E,

96-CV-413-K) were consolidated with 96-CV-313-B as the "Base File." All of the cases dealing primarily with Plaintiff's complaints concerning the conditions of confinement at TCJ (case nos. 96-CV-320-H, 96-CV-323-K, 96-CV-368-H, 96-CV-404-H, 96-CV-406-E, 96-CV-407-K, 96-CV-409-H, 96-CV-411-H, and 96-CV-412-BU) were consolidated with 96-CV-320-H as the "Base File." One remaining case, 96-CV-367-C, dealt primarily with Plaintiff's medical claims. Ultimately, on November 27, 1996, case nos. 96-CV-313-B, 96-CV-320-H, and 96-CV-367-C were consolidated with 96-CV-313-B as the "Base File." In other words, each of the twenty-three separate civil rights filings has been consolidated with the instant case, 96-CV-313-B.

By the terms of an Order filed August 20, 1996, this Court granted Plaintiff's motions to proceed *in forma pauperis* and to amend his complaint. Plaintiff was to amend within fifteen (15) days to cure certain deficiencies specified in the Order and he was provided copies of the court-approved form for the purpose of amending his complaint. Subsequent to the entry of that Order, Plaintiff was transferred to different institutions and sought several extensions of time within which to file his amended complaint in compliance with the Court's Order of August 20, 1996.

On February 18, 1997, Plaintiff submitted his "amended civil rights complaint in behalf of David B. McDermott, II" (Docket #21). Prior to filing his amended complaint, Plaintiff requested extensions of time (Docket #s 18, 19 and 20). As Plaintiff has now filed his amended complaint, the Court finds that the requests for additional time are moot.

In the August 20, 1996 Order, the Court advised Plaintiff that his complaint would be screened for frivolity. Specifically, Plaintiff was advised that his claims for monetary damages against the United States of America were barred by sovereign immunity, that Plaintiff's claims would be barred unless he indicated that he had exhausted his administrative remedies, and that his claims

against Stanley Glanz, Tulsa County Sheriff, would be dismissed for failure to state a claim unless Plaintiff alleged that Glanz caused or participated in the alleged constitutional deprivation. The August 20, 1996 Order specifically stated that "[t]his action will be dismissed as frivolous or for failure to state a claim upon which relief can be granted unless Plaintiff files a second amended complaint . . . curing the deficiencies noted in this order." Also, the Clerk of Court sent Plaintiff a blank civil rights complaint form labeled "second amended complaint." However, Plaintiff failed to submit his amended complaint on the court-approved form.

After reviewing Plaintiff's amended civil rights complaint, the Court finds that Plaintiff again failed to submit his amended complaint on the court-approved form.¹ In addition, Plaintiff failed to cure all of the deficiencies specified in the August 20, 1996 Order. Specifically, he continues to seek monetary damages from the United States of America, fails to allege that Defendant Glanz caused or participated in the alleged constitutional deprivations, and fails to identify specific defendants who did cause or participate in the alleged constitutional deprivations. Therefore, the Court finds that Plaintiff's "amended civil rights complaint" should be dismissed without prejudice as frivolous, for failure to state a claim upon which relief can be granted and for failure to comply with this Court's August 20, 1996 Order.

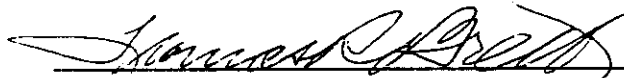
Each of Plaintiff's twenty-three (23) cases was consolidated for disposition with this case, 96-CV-313-B, as the "Base File." The dismissal of this case serves to terminate each of the associated cases. The Clerk of Court is directed to file a copy of this Order in each of the associated cases.

¹According to N.D. LR 9.3(A), "[a]ll petitions for writ of habeas corpus, motions, and civil rights complaints shall be on the applicable form and shall comply with the Local Rules and Information and Instructions."

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. This case is **dismissed without prejudice** at this time. The Court may reopen Plaintiff's action if he submits to the Court, within thirty (30) days of the date of this Order, an amended petition prepared on the Court-approved form, along with the requisite number of copies, summons and Marshal forms, all in full compliance with the Information and Instructions for Filing Complaints under 42 U.S.C. § 1983 and N.D. LR 9.3(A).
2. Any and all pending motions are **moot**.
3. For purposes of counting "prior occasions" under 28 U.S.C. § 1915(g), the Clerk of the Court is directed to "**flag**" this as a dismissal pursuant to 28 U.S.C. § 1915A(b).

SO ORDERED THIS 29th day of Sept., 1997.



THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 30 1997

DAVID B. McDERMOTT, II,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
et al.,

Defendants.

Case No. 96-CV-313-B
("Base File")

Phil Lombardi, Clerk
U.S. DISTRICT COURT

96-CV-314-B, 96-CV-315-B, 96-CV-316-H,
96-CV-320-H, 96-CV-321-H, 96-CV-322-B,
96-CV-323-K, 96-CV-367-C, 96-CV-368-H,
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96-CV-407-K, 96-CV-408-B, 96-CV-409-H,
96-CV-410-E, 96-CV-411-H, 96-CV-412-BU,
96-CV-413-K

ENTERED ON DOCKET

DATE 10-2-97

ORDER

In January of 1996, Plaintiff, a federal prisoner appearing *pro se*, began filing weekly motions in his criminal case (93-CR-163-E) complaining of conditions at the Tulsa County Jail (TJC) where he was being held as a pre-trial detainee. On April 4, 1996, Judge Ellison entered an Order in Plaintiff's criminal case which stated as follows:

The claims raised in the above pleadings [docket #208, #210, #211, #213, #214, #216, #217, #223, #225, #226, #228, #229, #230, #238, #239, #240, #242, #247, #251, #252, #253, and #254] challenge the conditions of McDermott's confinement at the Tulsa County Jail, and relate only marginally to his criminal case. Therefore, the Court can more appropriately address these claims in a separate civil rights action.

Accordingly, the Clerk shall OPEN separate civil rights actions for each of the above numbered pleadings and list the Tulsa County Jail and Sheriff Stanley Glanz as defendants. The Court will consolidate some of the individual actions after filing.

The Clerk's office opened twenty-three civil rights cases for Plaintiff. Originally, all of the cases dealing primarily with Plaintiff's complaints concerning the denial of his right to access a law library (case nos. 96-CV-313-B, 96-CV-314-B, 96-CV-315-B, 96-CV-316-H, 96-CV-321-H, 96-CV-322-B, 96-CV-369-B, 96-CV-370-B, 96-CV-371-BU, 96-CV-405-BU, 96-CV-408-B, 96-CV-410-E,

96-CV-413-K) were consolidated with 96-CV-313-B as the "Base File." All of the cases dealing primarily with Plaintiff's complaints concerning the conditions of confinement at TCJ (case nos. 96-CV-320-H, 96-CV-323-K, 96-CV-368-H, 96-CV-404-H, 96-CV-406-E, 96-CV-407-K, 96-CV-409-H, 96-CV-411-H, and 96-CV-412-BU) were consolidated with 96-CV-320-H as the "Base File." One remaining case, 96-CV-367-C, dealt primarily with Plaintiff's medical claims. Ultimately, on November 27, 1996, case nos. 96-CV-313-B, 96-CV-320-H, and 96-CV-367-C were consolidated with 96-CV-313-B as the "Base File." In other words, each of the twenty-three separate civil rights filings has been consolidated with the instant case, 96-CV-313-B.

By the terms of an Order filed August 20, 1996, this Court granted Plaintiff's motions to proceed *in forma pauperis* and to amend his complaint. Plaintiff was to amend within fifteen (15) days to cure certain deficiencies specified in the Order and he was provided copies of the court-approved form for the purpose of amending his complaint. Subsequent to the entry of that Order, Plaintiff was transferred to different institutions and sought several extensions of time within which to file his amended complaint in compliance with the Court's Order of August 20, 1996.

On February 18, 1997, Plaintiff submitted his "amended civil rights complaint in behalf of David B. McDermott, II" (Docket #21). Prior to filing his amended complaint, Plaintiff requested extensions of time (Docket #s 18, 19 and 20). As Plaintiff has now filed his amended complaint, the Court finds that the requests for additional time are moot.

In the August 20, 1996 Order, the Court advised Plaintiff that his complaint would be screened for frivolity. Specifically, Plaintiff was advised that his claims for monetary damages against the United States of America were barred by sovereign immunity, that Plaintiff's claims would be barred unless he indicated that he had exhausted his administrative remedies, and that his claims

against Stanley Glanz, Tulsa County Sheriff, would be dismissed for failure to state a claim unless Plaintiff alleged that Glanz caused or participated in the alleged constitutional deprivation. The August 20, 1996 Order specifically stated that "[t]his action will be dismissed as frivolous or for failure to state a claim upon which relief can be granted unless Plaintiff files a second amended complaint . . . curing the deficiencies noted in this order." Also, the Clerk of Court sent Plaintiff a blank civil rights complaint form labeled "second amended complaint." However, Plaintiff failed to submit his amended complaint on the court-approved form.

After reviewing Plaintiff's amended civil rights complaint, the Court finds that Plaintiff again failed to submit his amended complaint on the court-approved form.¹ In addition, Plaintiff failed to cure all of the deficiencies specified in the August 20, 1996 Order. Specifically, he continues to seek monetary damages from the United States of America, fails to allege that Defendant Glanz caused or participated in the alleged constitutional deprivations, and fails to identify specific defendants who did cause or participate in the alleged constitutional deprivations. Therefore, the Court finds that Plaintiff's "amended civil rights complaint" should be dismissed without prejudice as frivolous, for failure to state a claim upon which relief can be granted and for failure to comply with this Court's August 20, 1996 Order.


Each of Plaintiff's twenty-three (23) cases was consolidated for disposition with this case, 96-CV-313-B, as the "Base File." The dismissal of this case serves to terminate each of the associated cases. The Clerk of Court is directed to file a copy of this Order in each of the associated cases.

¹According to N.D. LR 9.3(A), "[a]ll petitions for writ of habeas corpus, motions, and civil rights complaints shall be on the applicable form and shall comply with the Local Rules and Information and Instructions."

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. This case is **dismissed without prejudice** at this time. The Court may reopen Plaintiff's action if he submits to the Court, within thirty (30) days of the date of this Order, an amended petition prepared on the Court-approved form, along with the requisite number of copies, summons and Marshal forms, all in full compliance with the Information and Instructions for Filing Complaints under 42 U.S.C. § 1983 and N.D. LR 9.3(A).
2. Any and all pending motions are **moot**.
3. For purposes of counting "prior occasions" under 28 U.S.C. § 1915(g), the Clerk of the Court is directed to "flag" this as a dismissal pursuant to 28 U.S.C. § 1915A(b).

SO ORDERED THIS 29th day of Sept., 1997.



THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
SEP 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DAVID B. McDERMOTT, II,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
et al.,

Defendants.

Case No. 96-CV-313-B

("Base File")

96-CV-314-B, 96-CV-315-B, 96-CV-316-H,
96-CV-320-H, 96-CV-321-H, 96-CV-322-B,
96-CV-323-K, 96-CV-367-C, 96-CV-368-H,
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96-CV-410-E, 96-CV-411-H, 96-CV-412-BU,
96-CV-413-K

ENTERED ON DOCKET

ORDER

DATE 10-2-97

In January of 1996, Plaintiff, a federal prisoner appearing *pro se*, began filing weekly motions in his criminal case (93-CR-163-E) complaining of conditions at the Tulsa County Jail (TJC) where he was being held as a pre-trial detainee. On April 4, 1996, Judge Ellison entered an Order in Plaintiff's criminal case which stated as follows:

The claims raised in the above pleadings [docket #208, #210, #211, #213, #214, #216, #217, #223, #225, #226, #228, #229, #230, #238, #239, #240, #242, #247, #251, #252, #253, and #254] challenge the conditions of McDermott's confinement at the Tulsa County Jail, and relate only marginally to his criminal case. Therefore, the Court can more appropriately address these claims in a separate civil rights action.

Accordingly, the Clerk shall OPEN separate civil rights actions for each of the above numbered pleadings and list the Tulsa County Jail and Sheriff Stanley Glanz as defendants. The Court will consolidate some of the individual actions after filing.

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96-CV-413-K) were consolidated with 96-CV-313-B as the "Base File." All of the cases dealing primarily with Plaintiff's complaints concerning the conditions of confinement at TCJ (case nos. 96-CV-320-H, 96-CV-323-K, 96-CV-368-H, 96-CV-404-H, 96-CV-406-E, 96-CV-407-K, 96-CV-409-H, 96-CV-411-H, and 96-CV-412-BU) were consolidated with 96-CV-320-H as the "Base File." One remaining case, 96-CV-367-C, dealt primarily with Plaintiff's medical claims. Ultimately, on November 27, 1996, case nos. 96-CV-313-B, 96-CV-320-H, and 96-CV-367-C were consolidated with 96-CV-313-B as the "Base File." In other words, each of the twenty-three separate civil rights filings has been consolidated with the instant case, 96-CV-313-B.

By the terms of an Order filed August 20, 1996, this Court granted Plaintiff's motions to proceed *in forma pauperis* and to amend his complaint. Plaintiff was to amend within fifteen (15) days to cure certain deficiencies specified in the Order and he was provided copies of the court-approved form for the purpose of amending his complaint. Subsequent to the entry of that Order, Plaintiff was transferred to different institutions and sought several extensions of time within which to file his amended complaint in compliance with the Court's Order of August 20, 1996.

On February 18, 1997, Plaintiff submitted his "amended civil rights complaint in behalf of David B. McDermott, II" (Docket #21). Prior to filing his amended complaint, Plaintiff requested extensions of time (Docket #s 18, 19 and 20). As Plaintiff has now filed his amended complaint, the Court finds that the requests for additional time are moot.

In the August 20, 1996 Order, the Court advised Plaintiff that his complaint would be screened for frivolity. Specifically, Plaintiff was advised that his claims for monetary damages against the United States of America were barred by sovereign immunity, that Plaintiff's claims would be barred unless he indicated that he had exhausted his administrative remedies, and that his claims

against Stanley Glanz, Tulsa County Sheriff, would be dismissed for failure to state a claim unless Plaintiff alleged that Glanz caused or participated in the alleged constitutional deprivation. The August 20, 1996 Order specifically stated that "[t]his action will be dismissed as frivolous or for failure to state a claim upon which relief can be granted unless Plaintiff files a second amended complaint . . . curing the deficiencies noted in this order." Also, the Clerk of Court sent Plaintiff a blank civil rights complaint form labeled "second amended complaint." However, Plaintiff failed to submit his amended complaint on the court-approved form.

After reviewing Plaintiff's amended civil rights complaint, the Court finds that Plaintiff again failed to submit his amended complaint on the court-approved form.¹ In addition, Plaintiff failed to cure all of the deficiencies specified in the August 20, 1996 Order. Specifically, he continues to seek monetary damages from the United States of America, fails to allege that Defendant Glanz caused or participated in the alleged constitutional deprivations, and fails to identify specific defendants who did cause or participate in the alleged constitutional deprivations. Therefore, the Court finds that Plaintiff's "amended civil rights complaint" should be dismissed without prejudice as frivolous, for failure to state a claim upon which relief can be granted and for failure to comply with this Court's August 20, 1996 Order.

Each of Plaintiff's twenty-three (23) cases was consolidated for disposition with this case, 96-CV-313-B, as the "Base File." The dismissal of this case serves to terminate each of the associated cases. The Clerk of Court is directed to file a copy of this Order in each of the associated cases.

¹According to N.D. LR 9.3(A), "[a]ll petitions for writ of habeas corpus, motions, and civil rights complaints shall be on the applicable form and shall comply with the Local Rules and Information and Instructions."

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. This case is **dismissed without prejudice** at this time. The Court may reopen Plaintiff's action if he submits to the Court, within thirty (30) days of the date of this Order, an amended petition prepared on the Court-approved form, along with the requisite number of copies, summons and Marshal forms, all in full compliance with the Information and Instructions for Filing Complaints under 42 U.S.C. § 1983 and N.D. LR 9.3(A).
2. Any and all pending motions are **moot**.
3. For purposes of counting "prior occasions" under 28 U.S.C. § 1915(g), the Clerk of the Court is directed to "**flag**" this as a dismissal pursuant to 28 U.S.C. § 1915A(b).

SO ORDERED THIS 29th day of Sept., 1997.



THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DAVID B. McDERMOTT, II,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
et al.,

Defendants.

Case No. 96-CV-313-B

("Base File")

96-CV-314-B, 96-CV-315-B, 96-CV-316-H,

96-CV-320-H, 96-CV-321-H, 96-CV-322-B,

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96-CV-369-B, 96-CV-370-B, 96-CV-371-BU,

96-CV-404-H, 96-CV-405-BU, 96-CV-406-E,

✓ 96-CV-407-K, 96-CV-408-B, 96-CV-409-H,

96-CV-410-E, 96-CV-411-H, 96-CV-412-BU,

96-CV-413-K

ENTERED ON DOCKET

DATE 10-2-97

ORDER

In January of 1996, Plaintiff, a federal prisoner appearing *pro se*, began filing weekly motions in his criminal case (93-CR-163-E) complaining of conditions at the Tulsa County Jail (TJC) where he was being held as a pre-trial detainee. On April 4, 1996, Judge Ellison entered an Order in Plaintiff's criminal case which stated as follows:

The claims raised in the above pleadings [docket #208, #210, #211, #213, #214, #216, #217, #223, #225, #226, #228, #229, #230, #238, #239, #240, #242, #247, #251, #252, #253, and #254] challenge the conditions of McDermott's confinement at the Tulsa County Jail, and relate only marginally to his criminal case. Therefore, the Court can more appropriately address these claims in a separate civil rights action.

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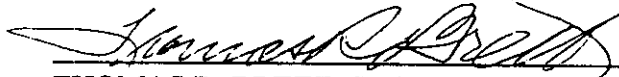
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ACCORDINGLY, IT IS HEREBY ORDERED that:

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2. Any and all pending motions are **moot**.
3. For purposes of counting "prior occasions" under 28 U.S.C. § 1915(g), the Clerk of the Court is directed to "**flag**" this as a dismissal pursuant to 28 U.S.C. § 1915A(b).

SO ORDERED THIS 29th day of Sept., 1997.


THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D

SEP 30 1997

Phil Lombardi, Clerk
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DATE 10-2-97

In January of 1996, Plaintiff, a federal prisoner appearing *pro se*, began filing weekly motions in his criminal case (93-CR-163-E) complaining of conditions at the Tulsa County Jail (TJC) where he was being held as a pre-trial detainee. On April 4, 1996, Judge Ellison entered an Order in Plaintiff's criminal case which stated as follows:

The claims raised in the above pleadings [docket #208, #210, #211, #213, #214, #216, #217, #223, #225, #226, #228, #229, #230, #238, #239, #240, #242, #247, #251, #252, #253, and #254] challenge the conditions of McDermott's confinement at the Tulsa County Jail, and relate only marginally to his criminal case. Therefore, the Court can more appropriately address these claims in a separate civil rights action.

Accordingly, the Clerk shall OPEN separate civil rights actions for each of the above numbered pleadings and list the Tulsa County Jail and Sheriff Stanley Glanz as defendants. The Court will consolidate some of the individual actions after filing.

The Clerk's office opened twenty-three civil rights cases for Plaintiff. Originally, all of the cases dealing primarily with Plaintiff's complaints concerning the denial of his right to access a law library (case nos. 96-CV-313-B, 96-CV-314-B, 96-CV-315-B, 96-CV-316-H, 96-CV-321-H, 96-CV-322-B, 96-CV-369-B, 96-CV-370-B, 96-CV-371-BU, 96-CV-405-BU, 96-CV-408-B, 96-CV-410-E,

96-CV-413-K) were consolidated with 96-CV-313-B as the "Base File." All of the cases dealing primarily with Plaintiff's complaints concerning the conditions of confinement at TCJ (case nos. 96-CV-320-H, 96-CV-323-K, 96-CV-368-H, 96-CV-404-H, 96-CV-406-E, 96-CV-407-K, 96-CV-409-H, 96-CV-411-H, and 96-CV-412-BU) were consolidated with 96-CV-320-H as the "Base File." One remaining case, 96-CV-367-C, dealt primarily with Plaintiff's medical claims. Ultimately, on November 27, 1996, case nos. 96-CV-313-B, 96-CV-320-H, and 96-CV-367-C were consolidated with 96-CV-313-B as the "Base File." In other words, each of the twenty-three separate civil rights filings has been consolidated with the instant case, 96-CV-313-B.

By the terms of an Order filed August 20, 1996, this Court granted Plaintiff's motions to proceed *in forma pauperis* and to amend his complaint. Plaintiff was to amend within fifteen (15) days to cure certain deficiencies specified in the Order and he was provided copies of the court-approved form for the purpose of amending his complaint. Subsequent to the entry of that Order, Plaintiff was transferred to different institutions and sought several extensions of time within which to file his amended complaint in compliance with the Court's Order of August 20, 1996.

On February 18, 1997, Plaintiff submitted his "amended civil rights complaint in behalf of David B. McDermott, II" (Docket #21). Prior to filing his amended complaint, Plaintiff requested extensions of time (Docket #s 18, 19 and 20). As Plaintiff has now filed his amended complaint, the Court finds that the requests for additional time are moot.

In the August 20, 1996 Order, the Court advised Plaintiff that his complaint would be screened for frivolity. Specifically, Plaintiff was advised that his claims for monetary damages against the United States of America were barred by sovereign immunity, that Plaintiff's claims would be barred unless he indicated that he had exhausted his administrative remedies, and that his claims

against Stanley Glanz, Tulsa County Sheriff, would be dismissed for failure to state a claim unless Plaintiff alleged that Glanz caused or participated in the alleged constitutional deprivation. The August 20, 1996 Order specifically stated that "[t]his action will be dismissed as frivolous or for failure to state a claim upon which relief can be granted unless Plaintiff files a second amended complaint . . . curing the deficiencies noted in this order." Also, the Clerk of Court sent Plaintiff a blank civil rights complaint form labeled "second amended complaint." However, Plaintiff failed to submit his amended complaint on the court-approved form.

After reviewing Plaintiff's amended civil rights complaint, the Court finds that Plaintiff again failed to submit his amended complaint on the court-approved form.¹ In addition, Plaintiff failed to cure all of the deficiencies specified in the August 20, 1996 Order. Specifically, he continues to seek monetary damages from the United States of America, fails to allege that Defendant Glanz caused or participated in the alleged constitutional deprivations, and fails to identify specific defendants who did cause or participate in the alleged constitutional deprivations. Therefore, the Court finds that Plaintiff's "amended civil rights complaint" should be dismissed without prejudice as frivolous, for failure to state a claim upon which relief can be granted and for failure to comply with this Court's August 20, 1996 Order.

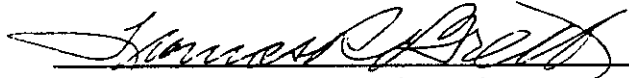
Each of Plaintiff's twenty-three (23) cases was consolidated for disposition with this case, 96-CV-313-B, as the "Base File." The dismissal of this case serves to terminate each of the associated cases. The Clerk of Court is directed to file a copy of this Order in each of the associated cases.

¹According to N.D. LR 9.3(A), "[a]ll petitions for writ of habeas corpus, motions, and civil rights complaints shall be on the applicable form and shall comply with the Local Rules and Information and Instructions."

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. This case is **dismissed without prejudice** at this time. The Court may reopen Plaintiff's action if he submits to the Court, within thirty (30) days of the date of this Order, an amended petition prepared on the Court-approved form, along with the requisite number of copies, summons and Marshal forms, all in full compliance with the Information and Instructions for Filing Complaints under 42 U.S.C. § 1983 and N.D. LR 9.3(A).
2. Any and all pending motions are **moot**.
3. For purposes of counting "prior occasions" under 28 U.S.C. § 1915(g), the Clerk of the Court is directed to "**flag**" this as a dismissal pursuant to 28 U.S.C. § 1915A(b).

SO ORDERED THIS 29th day of Sept., 1997.



THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DAVID B. McDERMOTT, II,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
et al.,

Defendants.

Case No. 96-CV-313-B

("Base File")

96-CV-314-B, 96-CV-315-B, 96-CV-316-H,
96-CV-320-H, 96-CV-321-H, 96-CV-322-B,
96-CV-323-K, 96-CV-367-C, 96-CV-368-H,
96-CV-369-B, 96-CV-370-B, 96-CV-371-BU,
96-CV-404-H, 96-CV-405-BU, 96-CV-406-E,
96-CV-407-K, 96-CV-408-B, 96-CV-409-H,
96-CV-410-E, 96-CV-411-H, 96-CV-412-BU,
96-CV-413-K

ENTERED ON DOCKET

ORDER

DATE 10-2-97

In January of 1996, Plaintiff, a federal prisoner appearing *pro se*, began filing weekly motions in his criminal case (93-CR-163-E) complaining of conditions at the Tulsa County Jail (TJC) where he was being held as a pre-trial detainee. On April 4, 1996, Judge Ellison entered an Order in Plaintiff's criminal case which stated as follows:

The claims raised in the above pleadings [docket #208, #210, #211, #213, #214, #216, #217, #223, #225, #226, #228, #229, #230, #238, #239, #240, #242, #247, #251, #252, #253, and #254] challenge the conditions of McDermott's confinement at the Tulsa County Jail, and relate only marginally to his criminal case. Therefore, the Court can more appropriately address these claims in a separate civil rights action.

Accordingly, the Clerk shall OPEN separate civil rights actions for each of the above numbered pleadings and list the Tulsa County Jail and Sheriff Stanley Glanz as defendants. The Court will consolidate some of the individual actions after filing.

The Clerk's office opened twenty-three civil rights cases for Plaintiff. Originally, all of the cases dealing primarily with Plaintiff's complaints concerning the denial of his right to access a law library (case nos. 96-CV-313-B, 96-CV-314-B, 96-CV-315-B, 96-CV-316-H, 96-CV-321-H, 96-CV-322-B, 96-CV-369-B, 96-CV-370-B, 96-CV-371-BU, 96-CV-405-BU, 96-CV-408-B, 96-CV-410-E,

96-CV-413-K) were consolidated with 96-CV-313-B as the "Base File." All of the cases dealing primarily with Plaintiff's complaints concerning the conditions of confinement at TCJ (case nos. 96-CV-320-H, 96-CV-323-K, 96-CV-368-H, 96-CV-404-H, 96-CV-406-E, 96-CV-407-K, 96-CV-409-H, 96-CV-411-H, and 96-CV-412-BU) were consolidated with 96-CV-320-H as the "Base File." One remaining case, 96-CV-367-C, dealt primarily with Plaintiff's medical claims. Ultimately, on November 27, 1996, case nos. 96-CV-313-B, 96-CV-320-H, and 96-CV-367-C were consolidated with 96-CV-313-B as the "Base File." In other words, each of the twenty-three separate civil rights filings has been consolidated with the instant case, 96-CV-313-B.

By the terms of an Order filed August 20, 1996, this Court granted Plaintiff's motions to proceed *in forma pauperis* and to amend his complaint. Plaintiff was to amend within fifteen (15) days to cure certain deficiencies specified in the Order and he was provided copies of the court-approved form for the purpose of amending his complaint. Subsequent to the entry of that Order, Plaintiff was transferred to different institutions and sought several extensions of time within which to file his amended complaint in compliance with the Court's Order of August 20, 1996.

On February 18, 1997, Plaintiff submitted his "amended civil rights complaint in behalf of David B. McDermott, II" (Docket #21). Prior to filing his amended complaint, Plaintiff requested extensions of time (Docket #s 18, 19 and 20). As Plaintiff has now filed his amended complaint, the Court finds that the requests for additional time are moot.

In the August 20, 1996 Order, the Court advised Plaintiff that his complaint would be screened for frivolity. Specifically, Plaintiff was advised that his claims for monetary damages against the United States of America were barred by sovereign immunity, that Plaintiff's claims would be barred unless he indicated that he had exhausted his administrative remedies, and that his claims

against Stanley Glanz, Tulsa County Sheriff, would be dismissed for failure to state a claim unless Plaintiff alleged that Glanz caused or participated in the alleged constitutional deprivation. The August 20, 1996 Order specifically stated that "[t]his action will be dismissed as frivolous or for failure to state a claim upon which relief can be granted unless Plaintiff files a second amended complaint . . . curing the deficiencies noted in this order." Also, the Clerk of Court sent Plaintiff a blank civil rights complaint form labeled "second amended complaint." However, Plaintiff failed to submit his amended complaint on the court-approved form.

After reviewing Plaintiff's amended civil rights complaint, the Court finds that Plaintiff again failed to submit his amended complaint on the court-approved form.¹ In addition, Plaintiff failed to cure all of the deficiencies specified in the August 20, 1996 Order. Specifically, he continues to seek monetary damages from the United States of America, fails to allege that Defendant Glanz caused or participated in the alleged constitutional deprivations, and fails to identify specific defendants who did cause or participate in the alleged constitutional deprivations. Therefore, the Court finds that Plaintiff's "amended civil rights complaint" should be dismissed without prejudice as frivolous, for failure to state a claim upon which relief can be granted and for failure to comply with this Court's August 20, 1996 Order.

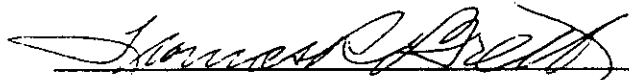
Each of Plaintiff's twenty-three (23) cases was consolidated for disposition with this case, 96-CV-313-B, as the "Base File." The dismissal of this case serves to terminate each of the associated cases. The Clerk of Court is directed to file a copy of this Order in each of the associated cases.

¹According to N.D. LR 9.3(A), "[a]ll petitions for writ of habeas corpus, motions, and civil rights complaints shall be on the applicable form and shall comply with the Local Rules and Information and Instructions."

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. This case is **dismissed without prejudice** at this time. The Court may reopen Plaintiff's action if he submits to the Court, within thirty (30) days of the date of this Order, an amended petition prepared on the Court-approved form, along with the requisite number of copies, summons and Marshal forms, all in full compliance with the Information and Instructions for Filing Complaints under 42 U.S.C. § 1983 and N.D. LR 9.3(A).
2. Any and all pending motions are **moot**.
3. For purposes of counting "prior occasions" under 28 U.S.C. § 1915(g), the Clerk of the Court is directed to **"flag"** this as a dismissal pursuant to 28 U.S.C. § 1915A(b).

SO ORDERED THIS 29th day of Sept., 1997.



THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

Mugshot given in ...

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SEP 30 1997 *P*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DAVID B. McDERMOTT, II,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
et al.,

Defendants.

Case No. 96-CV-313-B ✓

("Base File")

96-CV-314-B, 96-CV-315-B, 96-CV-316-H,

96-CV-320-H, 96-CV-321-H, 96-CV-322-B,

96-CV-323-K, 96-CV-367-C, 96-CV-368-H,

96-CV-369-B, 96-CV-370-B, 96-CV-371-BU,

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ENTERED ON DOCKET

ORDER

DATE 10-2-97

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By the terms of an Order filed August 20, 1996, this Court granted Plaintiff's motions to proceed *in forma pauperis* and to amend his complaint. Plaintiff was to amend within fifteen (15) days to cure certain deficiencies specified in the Order and he was provided copies of the court-approved form for the purpose of amending his complaint. Subsequent to the entry of that Order, Plaintiff was transferred to different institutions and sought several extensions of time within which to file his amended complaint in compliance with the Court's Order of August 20, 1996.

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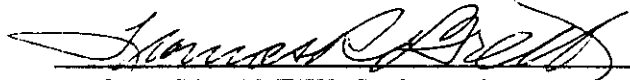
Each of Plaintiff's twenty-three (23) cases was consolidated for disposition with this case, 96-CV-313-B, as the "Base File." The dismissal of this case serves to terminate each of the associated cases. The Clerk of Court is directed to file a copy of this Order in each of the associated cases.

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ACCORDINGLY, IT IS HEREBY ORDERED that:

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2. Any and all pending motions are **moot**.
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SO ORDERED THIS 29th day of Sept., 1997.



THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

Министерство финансов

SEP 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-CV-313-B

("Base File")

96-CV-314-B, 96-CV-315-B, 96-CV-316-H,

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96-CV-323-K, 96-CV-367-C, 96-CV-368-H,

96-CV-369-B, 96-CV-370-B, 96-CV-371-BU, 4

96-CV-404-H, 96-CV-405-BU, 96-CV-406-E,

96-CV-407-K, 96-CV-408-B, 96-CV-409-H,

96-CV-410-E, 96-CV-411-H, 96-CV-412-BU,

96-CV-413-K

10-2-97

ENTERED ON DOCKET



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96-CV-413-K) were consolidated with 96-CV-313-B as the "Base File." All of the cases dealing primarily with Plaintiff's complaints concerning the conditions of confinement at TCJ (case nos. 96-CV-320-H, 96-CV-323-K, 96-CV-368-H, 96-CV-404-H, 96-CV-406-E, 96-CV-407-K, 96-CV-409-H, 96-CV-411-H, and 96-CV-412-BU) were consolidated with 96-CV-320-H as the "Base File." One remaining case, 96-CV-367-C, dealt primarily with Plaintiff's medical claims. Ultimately, on November 27, 1996, case nos. 96-CV-313-B, 96-CV-320-H, and 96-CV-367-C were consolidated with 96-CV-313-B as the "Base File." In other words, each of the twenty-three separate civil rights filings has been consolidated with the instant case, 96-CV-313-B.

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THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D

SEP 30 1997 *JP*

Phil Lombardi, Clerk
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("Base File")

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ENTERED ON DOCKET

DATE 10-2-97

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against Stanley Glanz, Tulsa County Sheriff, would be dismissed for failure to state a claim unless Plaintiff alleged that Glanz caused or participated in the alleged constitutional deprivation. The August 20, 1996 Order specifically stated that "[t]his action will be dismissed as frivolous or for failure to state a claim upon which relief can be granted unless Plaintiff files a second amended complaint . . . curing the deficiencies noted in this order." Also, the Clerk of Court sent Plaintiff a blank civil rights complaint form labeled "second amended complaint." However, Plaintiff failed to submit his amended complaint on the court-approved form.

After reviewing Plaintiff's amended civil rights complaint, the Court finds that Plaintiff again failed to submit his amended complaint on the court-approved form.¹ In addition, Plaintiff failed to cure all of the deficiencies specified in the August 20, 1996 Order. Specifically, he continues to seek monetary damages from the United States of America, fails to allege that Defendant Glanz caused or participated in the alleged constitutional deprivations, and fails to identify specific defendants who did cause or participate in the alleged constitutional deprivations. Therefore, the Court finds that Plaintiff's "amended civil rights complaint" should be dismissed without prejudice as frivolous, for failure to state a claim upon which relief can be granted and for failure to comply with this Court's August 20, 1996 Order.

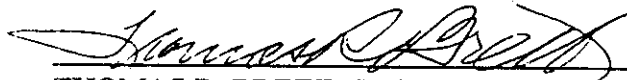
Each of Plaintiff's twenty-three (23) cases was consolidated for disposition with this case, 96-CV-313-B, as the "Base File." The dismissal of this case serves to terminate each of the associated cases. The Clerk of Court is directed to file a copy of this Order in each of the associated cases.

¹According to N.D. LR 9.3(A), "[a]ll petitions for writ of habeas corpus, motions, and civil rights complaints shall be on the applicable form and shall comply with the Local Rules and Information and Instructions."

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. This case is **dismissed without prejudice** at this time. The Court may reopen Plaintiff's action if he submits to the Court, within thirty (30) days of the date of this Order, an amended petition prepared on the Court-approved form, along with the requisite number of copies, summons and Marshal forms, all in full compliance with the Information and Instructions for Filing Complaints under 42 U.S.C. § 1983 and N.D. LR 9.3(A).
2. Any and all pending motions are **moot**.
3. For purposes of counting "prior occasions" under 28 U.S.C. § 1915(g), the Clerk of the Court is directed to "**flag**" this as a dismissal pursuant to 28 U.S.C. § 1915A(b).

SO ORDERED THIS 29th day of Sept., 1997.



THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DAVID B. McDERMOTT, II,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
et al.,

Defendants.

Case No. 96-CV-313-B

("Base File")

96-CV-314-B, 96-CV-315-B, 96-CV-316-H,

96-CV-320-H, 96-CV-321-H, 96-CV-322-B,

96-CV-323-K, 96-CV-367-C, 96-CV-368-H,

96-CV-369-B, 96-CV-370-B, 96-CV-371-BU,

96-CV-404-H, 96-CV-405-BU, 96-CV-406-E,

96-CV-407-K, 96-CV-408-B, 96-CV-409-H,

96-CV-410-E, 96-CV-411-H, 96-CV-412-BU,

96-CV-413-K

ENTERED ON DOCKET

ORDER

DATE 10-2-97

In January of 1996, Plaintiff, a federal prisoner appearing *pro se*, began filing weekly motions in his criminal case (93-CR-163-E) complaining of conditions at the Tulsa County Jail (TJC) where he was being held as a pre-trial detainee. On April 4, 1996, Judge Ellison entered an Order in Plaintiff's criminal case which stated as follows:

The claims raised in the above pleadings [docket #208, #210, #211, #213, #214, #216, #217, #223, #225, #226, #228, #229, #230, #238, #239, #240, #242, #247, #251, #252, #253, and #254] challenge the conditions of McDermott's confinement at the Tulsa County Jail, and relate only marginally to his criminal case. Therefore, the Court can more appropriately address these claims in a separate civil rights action.

Accordingly, the Clerk shall OPEN separate civil rights actions for each of the above numbered pleadings and list the Tulsa County Jail and Sheriff Stanley Glanz as defendants. The Court will consolidate some of the individual actions after filing.

The Clerk's office opened twenty-three civil rights cases for Plaintiff. Originally, all of the cases dealing primarily with Plaintiff's complaints concerning the denial of his right to access a law library (case nos. 96-CV-313-B, 96-CV-314-B, 96-CV-315-B, 96-CV-316-H, 96-CV-321-H, 96-CV-322-B, 96-CV-369-B, 96-CV-370-B, 96-CV-371-BU, 96-CV-405-BU, 96-CV-408-B, 96-CV-410-E,

96-CV-413-K) were consolidated with 96-CV-313-B as the "Base File." All of the cases dealing primarily with Plaintiff's complaints concerning the conditions of confinement at TCJ (case nos. 96-CV-320-H, 96-CV-323-K, 96-CV-368-H, 96-CV-404-H, 96-CV-406-E, 96-CV-407-K, 96-CV-409-H, 96-CV-411-H, and 96-CV-412-BU) were consolidated with 96-CV-320-H as the "Base File." One remaining case, 96-CV-367-C, dealt primarily with Plaintiff's medical claims. Ultimately, on November 27, 1996, case nos. 96-CV-313-B, 96-CV-320-H, and 96-CV-367-C were consolidated with 96-CV-313-B as the "Base File." In other words, each of the twenty-three separate civil rights filings has been consolidated with the instant case, 96-CV-313-B.

By the terms of an Order filed August 20, 1996, this Court granted Plaintiff's motions to proceed *in forma pauperis* and to amend his complaint. Plaintiff was to amend within fifteen (15) days to cure certain deficiencies specified in the Order and he was provided copies of the court-approved form for the purpose of amending his complaint. Subsequent to the entry of that Order, Plaintiff was transferred to different institutions and sought several extensions of time within which to file his amended complaint in compliance with the Court's Order of August 20, 1996.

On February 18, 1997, Plaintiff submitted his "amended civil rights complaint in behalf of David B. McDermott, II" (Docket #21). Prior to filing his amended complaint, Plaintiff requested extensions of time (Docket #s 18, 19 and 20). As Plaintiff has now filed his amended complaint, the Court finds that the requests for additional time are moot.

In the August 20, 1996 Order, the Court advised Plaintiff that his complaint would be screened for frivolity. Specifically, Plaintiff was advised that his claims for monetary damages against the United States of America were barred by sovereign immunity, that Plaintiff's claims would be barred unless he indicated that he had exhausted his administrative remedies, and that his claims

against Stanley Glanz, Tulsa County Sheriff, would be dismissed for failure to state a claim unless Plaintiff alleged that Glanz caused or participated in the alleged constitutional deprivation. The August 20, 1996 Order specifically stated that "[t]his action will be dismissed as frivolous or for failure to state a claim upon which relief can be granted unless Plaintiff files a second amended complaint . . . curing the deficiencies noted in this order." Also, the Clerk of Court sent Plaintiff a blank civil rights complaint form labeled "second amended complaint." However, Plaintiff failed to submit his amended complaint on the court-approved form.

After reviewing Plaintiff's amended civil rights complaint, the Court finds that Plaintiff again failed to submit his amended complaint on the court-approved form.¹ In addition, Plaintiff failed to cure all of the deficiencies specified in the August 20, 1996 Order. Specifically, he continues to seek monetary damages from the United States of America, fails to allege that Defendant Glanz caused or participated in the alleged constitutional deprivations, and fails to identify specific defendants who did cause or participate in the alleged constitutional deprivations. Therefore, the Court finds that Plaintiff's "amended civil rights complaint" should be dismissed without prejudice as frivolous, for failure to state a claim upon which relief can be granted and for failure to comply with this Court's August 20, 1996 Order.


Each of Plaintiff's twenty-three (23) cases was consolidated for disposition with this case, 96-CV-313-B, as the "Base File." The dismissal of this case serves to terminate each of the associated cases. The Clerk of Court is directed to file a copy of this Order in each of the associated cases.

¹According to N.D. LR 9.3(A), "[a]ll petitions for writ of habeas corpus, motions, and civil rights complaints shall be on the applicable form and shall comply with the Local Rules and Information and Instructions."

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. This case is **dismissed without prejudice** at this time. The Court may reopen Plaintiff's action if he submits to the Court, within thirty (30) days of the date of this Order, an amended petition prepared on the Court-approved form, along with the requisite number of copies, summons and Marshal forms, all in full compliance with the Information and Instructions for Filing Complaints under 42 U.S.C. § 1983 and N.D. LR 9.3(A).
2. Any and all pending motions are **moot**.
3. For purposes of counting "prior occasions" under 28 U.S.C. § 1915(g), the Clerk of the Court is directed to "**flag**" this as a dismissal pursuant to 28 U.S.C. § 1915A(b).

SO ORDERED THIS 29th day of Sept., 1997.


THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

F I L E D

SEP 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DAVID B. McDERMOTT, II,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
et al.,

Defendants.

Case No. 96-CV-313-B

("Base File")

96-CV-314-B, 96-CV-315-B, 96-CV-316-H,

96-CV-320-H, 96-CV-321-H, 96-CV-322-B,

96-CV-323-K, 96-CV-367-C, 96-CV-368-H,

96-CV-369-B, 96-CV-370-B, 96-CV-371-BU,

96-CV-404-H, 96-CV-405-BU, 96-CV-406-E,

96-CV-407-K, 96-CV-408-B, 96-CV-409-H,

96-CV-410-E, 96-CV-411-H, 96-CV-412-BU,

96-CV-413-K

ENTERED ON DOCKET

ORDER

DATE 10-2-97

In January of 1996, Plaintiff, a federal prisoner appearing *pro se*, began filing weekly motions in his criminal case (93-CR-163-E) complaining of conditions at the Tulsa County Jail (TJC) where he was being held as a pre-trial detainee. On April 4, 1996, Judge Ellison entered an Order in Plaintiff's criminal case which stated as follows:

The claims raised in the above pleadings [docket #208, #210, #211, #213, #214, #216, #217, #223, #225, #226, #228, #229, #230, #238, #239, #240, #242, #247, #251, #252, #253, and #254] challenge the conditions of McDermott's confinement at the Tulsa County Jail, and relate only marginally to his criminal case. Therefore, the Court can more appropriately address these claims in a separate civil rights action.

Accordingly, the Clerk shall OPEN separate civil rights actions for each of the above numbered pleadings and list the Tulsa County Jail and Sheriff Stanley Glanz as defendants. The Court will consolidate some of the individual actions after filing.

The Clerk's office opened twenty-three civil rights cases for Plaintiff. Originally, all of the cases dealing primarily with Plaintiff's complaints concerning the denial of his right to access a law library (case nos. 96-CV-313-B, 96-CV-314-B, 96-CV-315-B, 96-CV-316-H, 96-CV-321-H, 96-CV-322-B, 96-CV-369-B, 96-CV-370-B, 96-CV-371-BU, 96-CV-405-BU, 96-CV-408-B, 96-CV-410-E,

96-CV-413-K) were consolidated with 96-CV-313-B as the "Base File." All of the cases dealing primarily with Plaintiff's complaints concerning the conditions of confinement at TCJ (case nos. 96-CV-320-H, 96-CV-323-K, 96-CV-368-H, 96-CV-404-H, 96-CV-406-E, 96-CV-407-K, 96-CV-409-H, 96-CV-411-H, and 96-CV-412-BU) were consolidated with 96-CV-320-H as the "Base File." One remaining case, 96-CV-367-C, dealt primarily with Plaintiff's medical claims. Ultimately, on November 27, 1996, case nos. 96-CV-313-B, 96-CV-320-H, and 96-CV-367-C were consolidated with 96-CV-313-B as the "Base File." In other words, each of the twenty-three separate civil rights filings has been consolidated with the instant case, 96-CV-313-B.

By the terms of an Order filed August 20, 1996, this Court granted Plaintiff's motions to proceed *in forma pauperis* and to amend his complaint. Plaintiff was to amend within fifteen (15) days to cure certain deficiencies specified in the Order and he was provided copies of the court-approved form for the purpose of amending his complaint. Subsequent to the entry of that Order, Plaintiff was transferred to different institutions and sought several extensions of time within which to file his amended complaint in compliance with the Court's Order of August 20, 1996.

On February 18, 1997, Plaintiff submitted his "amended civil rights complaint in behalf of David B. McDermott, II" (Docket #21). Prior to filing his amended complaint, Plaintiff requested extensions of time (Docket #s 18, 19 and 20). As Plaintiff has now filed his amended complaint, the Court finds that the requests for additional time are moot.

In the August 20, 1996 Order, the Court advised Plaintiff that his complaint would be screened for frivolity. Specifically, Plaintiff was advised that his claims for monetary damages against the United States of America were barred by sovereign immunity, that Plaintiff's claims would be barred unless he indicated that he had exhausted his administrative remedies, and that his claims

against Stanley Glanz, Tulsa County Sheriff, would be dismissed for failure to state a claim unless Plaintiff alleged that Glanz caused or participated in the alleged constitutional deprivation. The August 20, 1996 Order specifically stated that "[t]his action will be dismissed as frivolous or for failure to state a claim upon which relief can be granted unless Plaintiff files a second amended complaint . . . curing the deficiencies noted in this order." Also, the Clerk of Court sent Plaintiff a blank civil rights complaint form labeled "second amended complaint." However, Plaintiff failed to submit his amended complaint on the court-approved form.

After reviewing Plaintiff's amended civil rights complaint, the Court finds that Plaintiff again failed to submit his amended complaint on the court-approved form.¹ In addition, Plaintiff failed to cure all of the deficiencies specified in the August 20, 1996 Order. Specifically, he continues to seek monetary damages from the United States of America, fails to allege that Defendant Glanz caused or participated in the alleged constitutional deprivations, and fails to identify specific defendants who did cause or participate in the alleged constitutional deprivations. Therefore, the Court finds that Plaintiff's "amended civil rights complaint" should be dismissed without prejudice as frivolous, for failure to state a claim upon which relief can be granted and for failure to comply with this Court's August 20, 1996 Order.

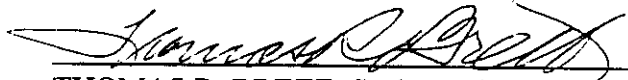
Each of Plaintiff's twenty-three (23) cases was consolidated for disposition with this case, 96-CV-313-B, as the "Base File." The dismissal of this case serves to terminate each of the associated cases. The Clerk of Court is directed to file a copy of this Order in each of the associated cases.

¹According to N.D. LR 9.3(A), "[a]ll petitions for writ of habeas corpus, motions, and civil rights complaints shall be on the applicable form and shall comply with the Local Rules and Information and Instructions."

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. This case is **dismissed without prejudice** at this time. The Court may reopen Plaintiff's action if he submits to the Court, within thirty (30) days of the date of this Order, an amended petition prepared on the Court-approved form, along with the requisite number of copies, summons and Marshal forms, all in full compliance with the Information and Instructions for Filing Complaints under 42 U.S.C. § 1983 and N.D. LR 9.3(A).
2. Any and all pending motions are **moot**.
3. For purposes of counting "prior occasions" under 28 U.S.C. § 1915(g), the Clerk of the Court is directed to "**flag**" this as a dismissal pursuant to 28 U.S.C. § 1915A(b).

SO ORDERED THIS 29th day of Sept., 1997.



THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

FILED

SEP 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DAVID B. McDERMOTT, II,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
et al.,

Defendants.

Case No. 96-CV-313-B

("Base File")

96-CV-314-B, 96-CV-315-B, 96-CV-316-H,
96-CV-320-H, 96-CV-321-H, 96-CV-322-B,
96-CV-323-K, 96-CV-367-C, 96-CV-368-H,
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96-CV-407-K, 96-CV-408-B, 96-CV-409-H,
96-CV-410-E, 96-CV-411-H, 96-CV-412-BU,
96-CV-413-K

ENTERED ON DOCKET

ORDER

DATE 10-2-97

In January of 1996, Plaintiff, a federal prisoner appearing *pro se*, began filing weekly motions in his criminal case (93-CR-163-E) complaining of conditions at the Tulsa County Jail (TJC) where he was being held as a pre-trial detainee. On April 4, 1996, Judge Ellison entered an Order in Plaintiff's criminal case which stated as follows:

The claims raised in the above pleadings [docket #208, #210, #211, #213, #214, #216, #217, #223, #225, #226, #228, #229, #230, #238, #239, #240, #242, #247, #251, #252, #253, and #254] challenge the conditions of McDermott's confinement at the Tulsa County Jail, and relate only marginally to his criminal case. Therefore, the Court can more appropriately address these claims in a separate civil rights action.

Accordingly, the Clerk shall OPEN separate civil rights actions for each of the above numbered pleadings and list the Tulsa County Jail and Sheriff Stanley Glanz as defendants. The Court will consolidate some of the individual actions after filing.

The Clerk's office opened twenty-three civil rights cases for Plaintiff. Originally, all of the cases dealing primarily with Plaintiff's complaints concerning the denial of his right to access a law library (case nos. 96-CV-313-B, 96-CV-314-B, 96-CV-315-B, 96-CV-316-H, 96-CV-321-H, 96-CV-322-B, 96-CV-369-B, 96-CV-370-B, 96-CV-371-BU, 96-CV-405-BU, 96-CV-408-B, 96-CV-410-E,

96-CV-413-K) were consolidated with 96-CV-313-B as the "Base File." All of the cases dealing primarily with Plaintiff's complaints concerning the conditions of confinement at TCJ (case nos. 96-CV-320-H, 96-CV-323-K, 96-CV-368-H, 96-CV-404-H, 96-CV-406-E, 96-CV-407-K, 96-CV-409-H, 96-CV-411-H, and 96-CV-412-BU) were consolidated with 96-CV-320-H as the "Base File." One remaining case, 96-CV-367-C, dealt primarily with Plaintiff's medical claims. Ultimately, on November 27, 1996, case nos. 96-CV-313-B, 96-CV-320-H, and 96-CV-367-C were consolidated with 96-CV-313-B as the "Base File." In other words, each of the twenty-three separate civil rights filings has been consolidated with the instant case, 96-CV-313-B.

By the terms of an Order filed August 20, 1996, this Court granted Plaintiff's motions to proceed *in forma pauperis* and to amend his complaint. Plaintiff was to amend within fifteen (15) days to cure certain deficiencies specified in the Order and he was provided copies of the court-approved form for the purpose of amending his complaint. Subsequent to the entry of that Order, Plaintiff was transferred to different institutions and sought several extensions of time within which to file his amended complaint in compliance with the Court's Order of August 20, 1996.

On February 18, 1997, Plaintiff submitted his "amended civil rights complaint in behalf of David B. McDermott, II" (Docket #21). Prior to filing his amended complaint, Plaintiff requested extensions of time (Docket #s 18, 19 and 20). As Plaintiff has now filed his amended complaint, the Court finds that the requests for additional time are moot.

In the August 20, 1996 Order, the Court advised Plaintiff that his complaint would be screened for frivolity. Specifically, Plaintiff was advised that his claims for monetary damages against the United States of America were barred by sovereign immunity, that Plaintiff's claims would be barred unless he indicated that he had exhausted his administrative remedies, and that his claims

against Stanley Glanz, Tulsa County Sheriff, would be dismissed for failure to state a claim unless Plaintiff alleged that Glanz caused or participated in the alleged constitutional deprivation. The August 20, 1996 Order specifically stated that "[t]his action will be dismissed as frivolous or for failure to state a claim upon which relief can be granted unless Plaintiff files a second amended complaint . . . curing the deficiencies noted in this order." Also, the Clerk of Court sent Plaintiff a blank civil rights complaint form labeled "second amended complaint." However, Plaintiff failed to submit his amended complaint on the court-approved form.

After reviewing Plaintiff's amended civil rights complaint, the Court finds that Plaintiff again failed to submit his amended complaint on the court-approved form.¹ In addition, Plaintiff failed to cure all of the deficiencies specified in the August 20, 1996 Order. Specifically, he continues to seek monetary damages from the United States of America, fails to allege that Defendant Glanz caused or participated in the alleged constitutional deprivations, and fails to identify specific defendants who did cause or participate in the alleged constitutional deprivations. Therefore, the Court finds that Plaintiff's "amended civil rights complaint" should be dismissed without prejudice as frivolous, for failure to state a claim upon which relief can be granted and for failure to comply with this Court's August 20, 1996 Order.

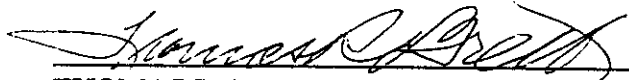
Each of Plaintiff's twenty-three (23) cases was consolidated for disposition with this case, 96-CV-313-B, as the "Base File." The dismissal of this case serves to terminate each of the associated cases. The Clerk of Court is directed to file a copy of this Order in each of the associated cases.

¹According to N.D. LR 9.3(A), "[a]ll petitions for writ of habeas corpus, motions, and civil rights complaints shall be on the applicable form and shall comply with the Local Rules and Information and Instructions."

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. This case is **dismissed without prejudice** at this time. The Court may reopen Plaintiff's action if he submits to the Court, within thirty (30) days of the date of this Order, an amended petition prepared on the Court-approved form, along with the requisite number of copies, summons and Marshal forms, all in full compliance with the Information and Instructions for Filing Complaints under 42 U.S.C. § 1983 and N.D. LR 9.3(A).
2. Any and all pending motions are **moot**.
3. For purposes of counting "prior occasions" under 28 U.S.C. § 1915(g), the Clerk of the Court is directed to "**flag**" this as a dismissal pursuant to 28 U.S.C. § 1915A(b).

SO ORDERED THIS 29th day of Sept., 1997.



THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DAVID B. McDERMOTT, II,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
et al.,

Defendants.

Case No. 96-CV-313-B

("Base File")

96-CV-314-B, 96-CV-315-B, 96-CV-316-H,

96-CV-320-H, 96-CV-321-H, 96-CV-322-B,

96-CV-323-K, 96-CV-367-C, 96-CV-368-H,

96-CV-369-B, 96-CV-370-B, 96-CV-371-BU,

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96-CV-407-K, 96-CV-408-B, 96-CV-409-H,

96-CV-410-E, 96-CV-411-H, 96-CV-412-BU,

96-CV-413-K

ENTERED ON DOCKET

ORDER

DATE 10-2-97

In January of 1996, Plaintiff, a federal prisoner appearing *pro se*, began filing weekly motions in his criminal case (93-CR-163-E) complaining of conditions at the Tulsa County Jail (TJC) where he was being held as a pre-trial detainee. On April 4, 1996, Judge Ellison entered an Order in Plaintiff's criminal case which stated as follows:

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By the terms of an Order filed August 20, 1996, this Court granted Plaintiff's motions to proceed *in forma pauperis* and to amend his complaint. Plaintiff was to amend within fifteen (15) days to cure certain deficiencies specified in the Order and he was provided copies of the court-approved form for the purpose of amending his complaint. Subsequent to the entry of that Order, Plaintiff was transferred to different institutions and sought several extensions of time within which to file his amended complaint in compliance with the Court's Order of August 20, 1996.

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against Stanley Glanz, Tulsa County Sheriff, would be dismissed for failure to state a claim unless Plaintiff alleged that Glanz caused or participated in the alleged constitutional deprivation. The August 20, 1996 Order specifically stated that "[t]his action will be dismissed as frivolous or for failure to state a claim upon which relief can be granted unless Plaintiff files a second amended complaint . . . curing the deficiencies noted in this order." Also, the Clerk of Court sent Plaintiff a blank civil rights complaint form labeled "second amended complaint." However, Plaintiff failed to submit his amended complaint on the court-approved form.

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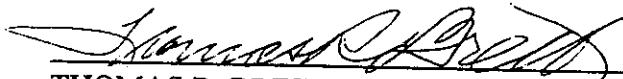
Each of Plaintiff's twenty-three (23) cases was consolidated for disposition with this case, 96-CV-313-B, as the "Base File." The dismissal of this case serves to terminate each of the associated cases. The Clerk of Court is directed to file a copy of this Order in each of the associated cases.

¹According to N.D. LR 9.3(A), "[a]ll petitions for writ of habeas corpus, motions, and civil rights complaints shall be on the applicable form and shall comply with the Local Rules and Information and Instructions."

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. This case is **dismissed without prejudice** at this time. The Court may reopen Plaintiff's action if he submits to the Court, within thirty (30) days of the date of this Order, an amended petition prepared on the Court-approved form, along with the requisite number of copies, summons and Marshal forms, all in full compliance with the Information and Instructions for Filing Complaints under 42 U.S.C. § 1983 and N.D. LR 9.3(A).
2. Any and all pending motions are **moot**.
3. For purposes of counting "prior occasions" under 28 U.S.C. § 1915(g), the Clerk of the Court is directed to "flag" this as a dismissal pursuant to 28 U.S.C. § 1915A(b).

SO ORDERED THIS 29th day of Sept., 1997.


THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DAVID B. McDERMOTT, II,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
et al.,

Defendants.

Case No. 96-CV-313-B

("Base File")

96-CV-314-B, 96-CV-315-B, 96-CV-316-H,

96-CV-320-H, 96-CV-321-H, 96-CV-322-B, ✓

96-CV-323-K, 96-CV-367-C, 96-CV-368-H,

96-CV-369-B, 96-CV-370-B, 96-CV-371-BU,

96-CV-404-H, 96-CV-405-BU, 96-CV-406-E,

96-CV-407-K, 96-CV-408-B, 96-CV-409-H,

96-CV-410-E, 96-CV-411-H, 96-CV-412-BU,

96-CV-413-K

ENTERED ON DOCKET

ORDERDATE 10-2-97

In January of 1996, Plaintiff, a federal prisoner appearing *pro se*, began filing weekly motions in his criminal case (93-CR-163-E) complaining of conditions at the Tulsa County Jail (TJC) where he was being held as a pre-trial detainee. On April 4, 1996, Judge Ellison entered an Order in Plaintiff's criminal case which stated as follows:

The claims raised in the above pleadings [docket #208, #210, #211, #213, #214, #216, #217, #223, #225, #226, #228, #229, #230, #238, #239, #240, #242, #247, #251, #252, #253, and #254] challenge the conditions of McDermott's confinement at the Tulsa County Jail, and relate only marginally to his criminal case. Therefore, the Court can more appropriately address these claims in a separate civil rights action.

Accordingly, the Clerk shall OPEN separate civil rights actions for each of the above numbered pleadings and list the Tulsa County Jail and Sheriff Stanley Glanz as defendants. The Court will consolidate some of the individual actions after filing.

The Clerk's office opened twenty-three civil rights cases for Plaintiff. Originally, all of the cases dealing primarily with Plaintiff's complaints concerning the denial of his right to access a law library (case nos. 96-CV-313-B, 96-CV-314-B, 96-CV-315-B, 96-CV-316-H, 96-CV-321-H, 96-CV-322-B, 96-CV-369-B, 96-CV-370-B, 96-CV-371-BU, 96-CV-405-BU, 96-CV-408-B, 96-CV-410-E,

96-CV-413-K) were consolidated with 96-CV-313-B as the "Base File." All of the cases dealing primarily with Plaintiff's complaints concerning the conditions of confinement at TCJ (case nos. 96-CV-320-H, 96-CV-323-K, 96-CV-368-H, 96-CV-404-H, 96-CV-406-E, 96-CV-407-K, 96-CV-409-H, 96-CV-411-H, and 96-CV-412-BU) were consolidated with 96-CV-320-H as the "Base File." One remaining case, 96-CV-367-C, dealt primarily with Plaintiff's medical claims. Ultimately, on November 27, 1996, case nos. 96-CV-313-B, 96-CV-320-H, and 96-CV-367-C were consolidated with 96-CV-313-B as the "Base File." In other words, each of the twenty-three separate civil rights filings has been consolidated with the instant case, 96-CV-313-B.

By the terms of an Order filed August 20, 1996, this Court granted Plaintiff's motions to proceed *in forma pauperis* and to amend his complaint. Plaintiff was to amend within fifteen (15) days to cure certain deficiencies specified in the Order and he was provided copies of the court-approved form for the purpose of amending his complaint. Subsequent to the entry of that Order, Plaintiff was transferred to different institutions and sought several extensions of time within which to file his amended complaint in compliance with the Court's Order of August 20, 1996.

On February 18, 1997, Plaintiff submitted his "amended civil rights complaint in behalf of David B. McDermott, II" (Docket #21). Prior to filing his amended complaint, Plaintiff requested extensions of time (Docket #s 18, 19 and 20). As Plaintiff has now filed his amended complaint, the Court finds that the requests for additional time are moot.

In the August 20, 1996 Order, the Court advised Plaintiff that his complaint would be screened for frivolity. Specifically, Plaintiff was advised that his claims for monetary damages against the United States of America were barred by sovereign immunity, that Plaintiff's claims would be barred unless he indicated that he had exhausted his administrative remedies, and that his claims

against Stanley Glanz, Tulsa County Sheriff, would be dismissed for failure to state a claim unless Plaintiff alleged that Glanz caused or participated in the alleged constitutional deprivation. The August 20, 1996 Order specifically stated that "[t]his action will be dismissed as frivolous or for failure to state a claim upon which relief can be granted unless Plaintiff files a second amended complaint . . . curing the deficiencies noted in this order." Also, the Clerk of Court sent Plaintiff a blank civil rights complaint form labeled "second amended complaint." However, Plaintiff failed to submit his amended complaint on the court-approved form.

After reviewing Plaintiff's amended civil rights complaint, the Court finds that Plaintiff again failed to submit his amended complaint on the court-approved form.¹ In addition, Plaintiff failed to cure all of the deficiencies specified in the August 20, 1996 Order. Specifically, he continues to seek monetary damages from the United States of America, fails to allege that Defendant Glanz caused or participated in the alleged constitutional deprivations, and fails to identify specific defendants who did cause or participate in the alleged constitutional deprivations. Therefore, the Court finds that Plaintiff's "amended civil rights complaint" should be dismissed without prejudice as frivolous, for failure to state a claim upon which relief can be granted and for failure to comply with this Court's August 20, 1996 Order.

Each of Plaintiff's twenty-three (23) cases was consolidated for disposition with this case, 96-CV-313-B, as the "Base File." The dismissal of this case serves to terminate each of the associated cases. The Clerk of Court is directed to file a copy of this Order in each of the associated cases.

¹According to N.D. LR 9.3(A), "[a]ll petitions for writ of habeas corpus, motions, and civil rights complaints shall be on the applicable form and shall comply with the Local Rules and Information and Instructions."

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. This case is **dismissed without prejudice** at this time. The Court may reopen Plaintiff's action if he submits to the Court, within thirty (30) days of the date of this Order, an amended petition prepared on the Court-approved form, along with the requisite number of copies, summons and Marshal forms, all in full compliance with the Information and Instructions for Filing Complaints under 42 U.S.C. § 1983 and N.D. LR 9.3(A).
2. Any and all pending motions are **moot**.
3. For purposes of counting "prior occasions" under 28 U.S.C. § 1915(g), the Clerk of the Court is directed to "**flag**" this as a dismissal pursuant to 28 U.S.C. § 1915A(b).

SO ORDERED THIS 29th day of Sept., 1997.



THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

FILED

SEP 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DAVID B. McDERMOTT, II,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
et al.,

Defendants.

Case No. 96-CV-313-B

("Base File")

96-CV-314-B, 96-CV-315-B, 96-CV-316-H,
96-CV-320-H, 96-CV-321-H, 96-CV-322-B,
96-CV-323-K, 96-CV-367-C, 96-CV-368-H,
96-CV-369-B, 96-CV-370-B, 96-CV-371-BU,
96-CV-404-H, 96-CV-405-BU, 96-CV-406-E,
96-CV-407-K, 96-CV-408-B, 96-CV-409-H,
96-CV-410-E, 96-CV-411-H, 96-CV-412-BU,
96-CV-413-K

ENTERED ON DOCKET

ORDER

DATE 10-2-97

In January of 1996, Plaintiff, a federal prisoner appearing *pro se*, began filing weekly motions in his criminal case (93-CR-163-E) complaining of conditions at the Tulsa County Jail (TJC) where he was being held as a pre-trial detainee. On April 4, 1996, Judge Ellison entered an Order in Plaintiff's criminal case which stated as follows:

The claims raised in the above pleadings [docket #208, #210, #211, #213, #214, #216, #217, #223, #225, #226, #228, #229, #230, #238, #239, #240, #242, #247, #251, #252, #253, and #254] challenge the conditions of McDermott's confinement at the Tulsa County Jail, and relate only marginally to his criminal case. Therefore, the Court can more appropriately address these claims in a separate civil rights action.

Accordingly, the Clerk shall OPEN separate civil rights actions for each of the above numbered pleadings and list the Tulsa County Jail and Sheriff Stanley Glanz as defendants. The Court will consolidate some of the individual actions after filing.

The Clerk's office opened twenty-three civil rights cases for Plaintiff. Originally, all of the cases dealing primarily with Plaintiff's complaints concerning the denial of his right to access a law library (case nos. 96-CV-313-B, 96-CV-314-B, 96-CV-315-B, 96-CV-316-H, 96-CV-321-H, 96-CV-322-B, 96-CV-369-B, 96-CV-370-B, 96-CV-371-BU, 96-CV-405-BU, 96-CV-408-B, 96-CV-410-E,

96-CV-413-K) were consolidated with 96-CV-313-B as the "Base File." All of the cases dealing primarily with Plaintiff's complaints concerning the conditions of confinement at TCJ (case nos. 96-CV-320-H, 96-CV-323-K, 96-CV-368-H, 96-CV-404-H, 96-CV-406-E, 96-CV-407-K, 96-CV-409-H, 96-CV-411-H, and 96-CV-412-BU) were consolidated with 96-CV-320-H as the "Base File." One remaining case, 96-CV-367-C, dealt primarily with Plaintiff's medical claims. Ultimately, on November 27, 1996, case nos. 96-CV-313-B, 96-CV-320-H, and 96-CV-367-C were consolidated with 96-CV-313-B as the "Base File." In other words, each of the twenty-three separate civil rights filings has been consolidated with the instant case, 96-CV-313-B.

By the terms of an Order filed August 20, 1996, this Court granted Plaintiff's motions to proceed *in forma pauperis* and to amend his complaint. Plaintiff was to amend within fifteen (15) days to cure certain deficiencies specified in the Order and he was provided copies of the court-approved form for the purpose of amending his complaint. Subsequent to the entry of that Order, Plaintiff was transferred to different institutions and sought several extensions of time within which to file his amended complaint in compliance with the Court's Order of August 20, 1996.

On February 18, 1997, Plaintiff submitted his "amended civil rights complaint in behalf of David B. McDermott, II" (Docket #21). Prior to filing his amended complaint, Plaintiff requested extensions of time (Docket #s 18, 19 and 20). As Plaintiff has now filed his amended complaint, the Court finds that the requests for additional time are moot.

In the August 20, 1996 Order, the Court advised Plaintiff that his complaint would be screened for frivolity. Specifically, Plaintiff was advised that his claims for monetary damages against the United States of America were barred by sovereign immunity, that Plaintiff's claims would be barred unless he indicated that he had exhausted his administrative remedies, and that his claims

against Stanley Glanz, Tulsa County Sheriff, would be dismissed for failure to state a claim unless Plaintiff alleged that Glanz caused or participated in the alleged constitutional deprivation. The August 20, 1996 Order specifically stated that "[t]his action will be dismissed as frivolous or for failure to state a claim upon which relief can be granted unless Plaintiff files a second amended complaint . . . curing the deficiencies noted in this order." Also, the Clerk of Court sent Plaintiff a blank civil rights complaint form labeled "second amended complaint." However, Plaintiff failed to submit his amended complaint on the court-approved form.

After reviewing Plaintiff's amended civil rights complaint, the Court finds that Plaintiff again failed to submit his amended complaint on the court-approved form.¹ In addition, Plaintiff failed to cure all of the deficiencies specified in the August 20, 1996 Order. Specifically, he continues to seek monetary damages from the United States of America, fails to allege that Defendant Glanz caused or participated in the alleged constitutional deprivations, and fails to identify specific defendants who did cause or participate in the alleged constitutional deprivations. Therefore, the Court finds that Plaintiff's "amended civil rights complaint" should be dismissed without prejudice as frivolous, for failure to state a claim upon which relief can be granted and for failure to comply with this Court's August 20, 1996 Order.

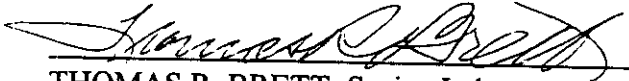
Each of Plaintiff's twenty-three (23) cases was consolidated for disposition with this case, 96-CV-313-B, as the "Base File." The dismissal of this case serves to terminate each of the associated cases. The Clerk of Court is directed to file a copy of this Order in each of the associated cases.

¹According to N.D. LR 9.3(A), "[a]ll petitions for writ of habeas corpus, motions, and civil rights complaints shall be on the applicable form and shall comply with the Local Rules and Information and Instructions."

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. This case is **dismissed without prejudice** at this time. The Court may reopen Plaintiff's action if he submits to the Court, within thirty (30) days of the date of this Order, an amended petition prepared on the Court-approved form, along with the requisite number of copies, summons and Marshal forms, all in full compliance with the Information and Instructions for Filing Complaints under 42 U.S.C. § 1983 and N.D. LR 9.3(A).
2. Any and all pending motions are **moot**.
3. For purposes of counting "prior occasions" under 28 U.S.C. § 1915(g), the Clerk of the Court is directed to "**flag**" this as a dismissal pursuant to 28 U.S.C. § 1915A(b).

SO ORDERED THIS 29th day of Sept., 1997.


THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

FILED
SEP 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DAVID B. McDERMOTT, II,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
et al.,

Defendants.

Case No. 96-CV-313-B
("Base File")

96-CV-314-B, 96-CV-315-B, 96-CV-316-H,
✓ 96-CV-320-H, 96-CV-321-H, 96-CV-322-B,
96-CV-323-K, 96-CV-367-C, 96-CV-368-H,
96-CV-369-B, 96-CV-370-B, 96-CV-371-BU,
96-CV-404-H, 96-CV-405-BU, 96-CV-406-E,
96-CV-407-K, 96-CV-408-B, 96-CV-409-H,
96-CV-410-E, 96-CV-411-H, 96-CV-412-BU,
96-CV-413-K

ENTERED ON DOCKET

ORDER

DATE 10-2-97

In January of 1996, Plaintiff, a federal prisoner appearing *pro se*, began filing weekly motions in his criminal case (93-CR-163-E) complaining of conditions at the Tulsa County Jail (TJC) where he was being held as a pre-trial detainee. On April 4, 1996, Judge Ellison entered an Order in Plaintiff's criminal case which stated as follows:

The claims raised in the above pleadings [docket #208, #210, #211, #213, #214, #216, #217, #223, #225, #226, #228, #229, #230, #238, #239, #240, #242, #247, #251, #252, #253, and #254] challenge the conditions of McDermott's confinement at the Tulsa County Jail, and relate only marginally to his criminal case. Therefore, the Court can more appropriately address these claims in a separate civil rights action.

Accordingly, the Clerk shall OPEN separate civil rights actions for each of the above numbered pleadings and list the Tulsa County Jail and Sheriff Stanley Glanz as defendants. The Court will consolidate some of the individual actions after filing.

The Clerk's office opened twenty-three civil rights cases for Plaintiff. Originally, all of the cases dealing primarily with Plaintiff's complaints concerning the denial of his right to access a law library (case nos. 96-CV-313-B, 96-CV-314-B, 96-CV-315-B, 96-CV-316-H, 96-CV-321-H, 96-CV-322-B, 96-CV-369-B, 96-CV-370-B, 96-CV-371-BU, 96-CV-405-BU, 96-CV-408-B, 96-CV-410-E,

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96-CV-413-K) were consolidated with 96-CV-313-B as the "Base File." All of the cases dealing primarily with Plaintiff's complaints concerning the conditions of confinement at TCJ (case nos. 96-CV-320-H, 96-CV-323-K, 96-CV-368-H, 96-CV-404-H, 96-CV-406-E, 96-CV-407-K, 96-CV-409-H, 96-CV-411-H, and 96-CV-412-BU) were consolidated with 96-CV-320-H as the "Base File." One remaining case, 96-CV-367-C, dealt primarily with Plaintiff's medical claims. Ultimately, on November 27, 1996, case nos. 96-CV-313-B, 96-CV-320-H, and 96-CV-367-C were consolidated with 96-CV-313-B as the "Base File." In other words, each of the twenty-three separate civil rights filings has been consolidated with the instant case, 96-CV-313-B.

By the terms of an Order filed August 20, 1996, this Court granted Plaintiff's motions to proceed *in forma pauperis* and to amend his complaint. Plaintiff was to amend within fifteen (15) days to cure certain deficiencies specified in the Order and he was provided copies of the court-approved form for the purpose of amending his complaint. Subsequent to the entry of that Order, Plaintiff was transferred to different institutions and sought several extensions of time within which to file his amended complaint in compliance with the Court's Order of August 20, 1996.

On February 18, 1997, Plaintiff submitted his "amended civil rights complaint in behalf of David B. McDermott, II" (Docket #21). Prior to filing his amended complaint, Plaintiff requested extensions of time (Docket #s 18, 19 and 20). As Plaintiff has now filed his amended complaint, the Court finds that the requests for additional time are moot.

In the August 20, 1996 Order, the Court advised Plaintiff that his complaint would be screened for frivolity. Specifically, Plaintiff was advised that his claims for monetary damages against the United States of America were barred by sovereign immunity, that Plaintiff's claims would be barred unless he indicated that he had exhausted his administrative remedies, and that his claims

against Stanley Glanz, Tulsa County Sheriff, would be dismissed for failure to state a claim unless Plaintiff alleged that Glanz caused or participated in the alleged constitutional deprivation. The August 20, 1996 Order specifically stated that "[t]his action will be dismissed as frivolous or for failure to state a claim upon which relief can be granted unless Plaintiff files a second amended complaint . . . curing the deficiencies noted in this order." Also, the Clerk of Court sent Plaintiff a blank civil rights complaint form labeled "second amended complaint." However, Plaintiff failed to submit his amended complaint on the court-approved form.

After reviewing Plaintiff's amended civil rights complaint, the Court finds that Plaintiff again failed to submit his amended complaint on the court-approved form.¹ In addition, Plaintiff failed to cure all of the deficiencies specified in the August 20, 1996 Order. Specifically, he continues to seek monetary damages from the United States of America, fails to allege that Defendant Glanz caused or participated in the alleged constitutional deprivations, and fails to identify specific defendants who did cause or participate in the alleged constitutional deprivations. Therefore, the Court finds that Plaintiff's "amended civil rights complaint" should be dismissed without prejudice as frivolous, for failure to state a claim upon which relief can be granted and for failure to comply with this Court's August 20, 1996 Order.

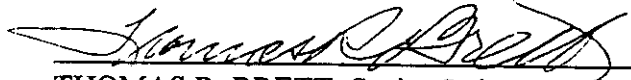
Each of Plaintiff's twenty-three (23) cases was consolidated for disposition with this case, 96-CV-313-B, as the "Base File." The dismissal of this case serves to terminate each of the associated cases. The Clerk of Court is directed to file a copy of this Order in each of the associated cases.

¹According to N.D. LR 9.3(A), "[a]ll petitions for writ of habeas corpus, motions, and civil rights complaints shall be on the applicable form and shall comply with the Local Rules and Information and Instructions."

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. This case is **dismissed without prejudice** at this time. The Court may reopen Plaintiff's action if he submits to the Court, within thirty (30) days of the date of this Order, an amended petition prepared on the Court-approved form, along with the requisite number of copies, summons and Marshal forms, all in full compliance with the Information and Instructions for Filing Complaints under 42 U.S.C. § 1983 and N.D. LR 9.3(A).
2. Any and all pending motions are **moot**.
3. For purposes of counting "prior occasions" under 28 U.S.C. § 1915(g), the Clerk of the Court is directed to "**flag**" this as a dismissal pursuant to 28 U.S.C. § 1915A(b).

SO ORDERED THIS 29th day of Sept, 1997.



THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DAVID B. McDERMOTT, II,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
et al.,

Defendants.

Case No. 96-CV-313-B

("Base File")

96-CV-314-B, 96-CV-315-B, 96-CV-316-H,

96-CV-320-H, 96-CV-321-H, 96-CV-322-B,

96-CV-323-K, 96-CV-367-C, 96-CV-368-H,

96-CV-369-B, 96-CV-370-B, 96-CV-371-BU,

96-CV-404-H, 96-CV-405-BU, 96-CV-406-E,

96-CV-407-K, 96-CV-408-B, 96-CV-409-H,

96-CV-410-E, 96-CV-411-H, 96-CV-412-BU,

96-CV-413-K

ENTERED ON DOCKET

DATE 10-2-97

ORDER

In January of 1996, Plaintiff, a federal prisoner appearing *pro se*, began filing weekly motions in his criminal case (93-CR-163-E) complaining of conditions at the Tulsa County Jail (TJC) where he was being held as a pre-trial detainee. On April 4, 1996, Judge Ellison entered an Order in Plaintiff's criminal case which stated as follows:

The claims raised in the above pleadings [docket #208, #210, #211, #213, #214, #216, #217, #223, #225, #226, #228, #229, #230, #238, #239, #240, #242, #247, #251, #252, #253, and #254] challenge the conditions of McDermott's confinement at the Tulsa County Jail, and relate only marginally to his criminal case. Therefore, the Court can more appropriately address these claims in a separate civil rights action.

Accordingly, the Clerk shall OPEN separate civil rights actions for each of the above numbered pleadings and list the Tulsa County Jail and Sheriff Stanley Glanz as defendants. The Court will consolidate some of the individual actions after filing.

The Clerk's office opened twenty-three civil rights cases for Plaintiff. Originally, all of the cases dealing primarily with Plaintiff's complaints concerning the denial of his right to access a law library (case nos. 96-CV-313-B, 96-CV-314-B, 96-CV-315-B, 96-CV-316-H, 96-CV-321-H, 96-CV-322-B, 96-CV-369-B, 96-CV-370-B, 96-CV-371-BU, 96-CV-405-BU, 96-CV-408-B, 96-CV-410-E,

96-CV-413-K) were consolidated with 96-CV-313-B as the "Base File." All of the cases dealing primarily with Plaintiff's complaints concerning the conditions of confinement at TCJ (case nos. 96-CV-320-H, 96-CV-323-K, 96-CV-368-H, 96-CV-404-H, 96-CV-406-E, 96-CV-407-K, 96-CV-409-H, 96-CV-411-H, and 96-CV-412-BU) were consolidated with 96-CV-320-H as the "Base File." One remaining case, 96-CV-367-C, dealt primarily with Plaintiff's medical claims. Ultimately, on November 27, 1996, case nos. 96-CV-313-B, 96-CV-320-H, and 96-CV-367-C were consolidated with 96-CV-313-B as the "Base File." In other words, each of the twenty-three separate civil rights filings has been consolidated with the instant case, 96-CV-313-B.

By the terms of an Order filed August 20, 1996, this Court granted Plaintiff's motions to proceed *in forma pauperis* and to amend his complaint. Plaintiff was to amend within fifteen (15) days to cure certain deficiencies specified in the Order and he was provided copies of the court-approved form for the purpose of amending his complaint. Subsequent to the entry of that Order, Plaintiff was transferred to different institutions and sought several extensions of time within which to file his amended complaint in compliance with the Court's Order of August 20, 1996.

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against Stanley Glanz, Tulsa County Sheriff, would be dismissed for failure to state a claim unless Plaintiff alleged that Glanz caused or participated in the alleged constitutional deprivation. The August 20, 1996 Order specifically stated that "[t]his action will be dismissed as frivolous or for failure to state a claim upon which relief can be granted unless Plaintiff files a second amended complaint . . . curing the deficiencies noted in this order." Also, the Clerk of Court sent Plaintiff a blank civil rights complaint form labeled "second amended complaint." However, Plaintiff failed to submit his amended complaint on the court-approved form.

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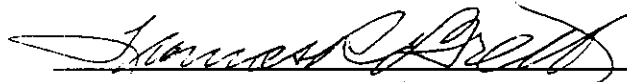
Each of Plaintiff's twenty-three (23) cases was consolidated for disposition with this case, 96-CV-313-B, as the "Base File." The dismissal of this case serves to terminate each of the associated cases. The Clerk of Court is directed to file a copy of this Order in each of the associated cases.

¹According to N.D. LR 9.3(A), "[a]ll petitions for writ of habeas corpus, motions, and civil rights complaints shall be on the applicable form and shall comply with the Local Rules and Information and Instructions."

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. This case is **dismissed without prejudice** at this time. The Court may reopen Plaintiff's action if he submits to the Court, within thirty (30) days of the date of this Order, an amended petition prepared on the Court-approved form, along with the requisite number of copies, summons and Marshal forms, all in full compliance with the Information and Instructions for Filing Complaints under 42 U.S.C. § 1983 and N.D. LR 9.3(A).
2. Any and all pending motions are **moot**.
3. For purposes of counting "prior occasions" under 28 U.S.C. § 1915(g), the Clerk of the Court is directed to **"flag"** this as a dismissal pursuant to 28 U.S.C. § 1915A(b).

SO ORDERED THIS 29th day of Sept., 1997.



THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

FILED

SEP 30 1997 *PD*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DAVID B. McDERMOTT, II,

Plaintiff,

vs.

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Defendants.

Case No. 96-CV-313-B

("Base File")

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96-CV-320-H, 96-CV-321-H, 96-CV-322-B,
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96-CV-413-K

ENTERED ON DOCKET

ORDER

DATE 10-2-97

In January of 1996, Plaintiff, a federal prisoner appearing *pro se*, began filing weekly motions in his criminal case (93-CR-163-E) complaining of conditions at the Tulsa County Jail (TJC) where he was being held as a pre-trial detainee. On April 4, 1996, Judge Ellison entered an Order in Plaintiff's criminal case which stated as follows:

The claims raised in the above pleadings [docket #208, #210, #211, #213, #214, #216, #217, #223, #225, #226, #228, #229, #230, #238, #239, #240, #242, #247, #251, #252, #253, and #254] challenge the conditions of McDermott's confinement at the Tulsa County Jail, and relate only marginally to his criminal case. Therefore, the Court can more appropriately address these claims in a separate civil rights action.

Accordingly, the Clerk shall OPEN separate civil rights actions for each of the above numbered pleadings and list the Tulsa County Jail and Sheriff Stanley Glanz as defendants. The Court will consolidate some of the individual actions after filing.

The Clerk's office opened twenty-three civil rights cases for Plaintiff. Originally, all of the cases dealing primarily with Plaintiff's complaints concerning the denial of his right to access a law library (case nos. 96-CV-313-B, 96-CV-314-B, 96-CV-315-B, 96-CV-316-H, 96-CV-321-H, 96-CV-322-B, 96-CV-369-B, 96-CV-370-B, 96-CV-371-BU, 96-CV-405-BU, 96-CV-408-B, 96-CV-410-E,

96-CV-413-K) were consolidated with 96-CV-313-B as the "Base File." All of the cases dealing primarily with Plaintiff's complaints concerning the conditions of confinement at TCJ (case nos. 96-CV-320-H, 96-CV-323-K, 96-CV-368-H, 96-CV-404-H, 96-CV-406-E, 96-CV-407-K, 96-CV-409-H, 96-CV-411-H, and 96-CV-412-BU) were consolidated with 96-CV-320-H as the "Base File." One remaining case, 96-CV-367-C, dealt primarily with Plaintiff's medical claims. Ultimately, on November 27, 1996, case nos. 96-CV-313-B, 96-CV-320-H, and 96-CV-367-C were consolidated with 96-CV-313-B as the "Base File." In other words, each of the twenty-three separate civil rights filings has been consolidated with the instant case, 96-CV-313-B.

By the terms of an Order filed August 20, 1996, this Court granted Plaintiff's motions to proceed *in forma pauperis* and to amend his complaint. Plaintiff was to amend within fifteen (15) days to cure certain deficiencies specified in the Order and he was provided copies of the court-approved form for the purpose of amending his complaint. Subsequent to the entry of that Order, Plaintiff was transferred to different institutions and sought several extensions of time within which to file his amended complaint in compliance with the Court's Order of August 20, 1996.

On February 18, 1997, Plaintiff submitted his "amended civil rights complaint in behalf of David B. McDermott, II" (Docket #21). Prior to filing his amended complaint, Plaintiff requested extensions of time (Docket #s 18, 19 and 20). As Plaintiff has now filed his amended complaint, the Court finds that the requests for additional time are moot.

In the August 20, 1996 Order, the Court advised Plaintiff that his complaint would be screened for frivolity. Specifically, Plaintiff was advised that his claims for monetary damages against the United States of America were barred by sovereign immunity, that Plaintiff's claims would be barred unless he indicated that he had exhausted his administrative remedies, and that his claims

against Stanley Glanz, Tulsa County Sheriff, would be dismissed for failure to state a claim unless Plaintiff alleged that Glanz caused or participated in the alleged constitutional deprivation. The August 20, 1996 Order specifically stated that "[t]his action will be dismissed as frivolous or for failure to state a claim upon which relief can be granted unless Plaintiff files a second amended complaint . . . curing the deficiencies noted in this order." Also, the Clerk of Court sent Plaintiff a blank civil rights complaint form labeled "second amended complaint." However, Plaintiff failed to submit his amended complaint on the court-approved form.

After reviewing Plaintiff's amended civil rights complaint, the Court finds that Plaintiff again failed to submit his amended complaint on the court-approved form.¹ In addition, Plaintiff failed to cure all of the deficiencies specified in the August 20, 1996 Order. Specifically, he continues to seek monetary damages from the United States of America, fails to allege that Defendant Glanz caused or participated in the alleged constitutional deprivations, and fails to identify specific defendants who did cause or participate in the alleged constitutional deprivations. Therefore, the Court finds that Plaintiff's "amended civil rights complaint" should be dismissed without prejudice as frivolous, for failure to state a claim upon which relief can be granted and for failure to comply with this Court's August 20, 1996 Order.


Each of Plaintiff's twenty-three (23) cases was consolidated for disposition with this case, 96-CV-313-B, as the "Base File." The dismissal of this case serves to terminate each of the associated cases. The Clerk of Court is directed to file a copy of this Order in each of the associated cases.

¹According to N.D. LR 9.3(A), "[a]ll petitions for writ of habeas corpus, motions, and civil rights complaints shall be on the applicable form and shall comply with the Local Rules and Information and Instructions."

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. This case is **dismissed without prejudice** at this time. The Court may reopen Plaintiff's action if he submits to the Court, within thirty (30) days of the date of this Order, an amended petition prepared on the Court-approved form, along with the requisite number of copies, summons and Marshal forms, all in full compliance with the Information and Instructions for Filing Complaints under 42 U.S.C. § 1983 and N.D. LR 9.3(A).
2. Any and all pending motions are **moot**.
3. For purposes of counting "prior occasions" under 28 U.S.C. § 1915(g), the Clerk of the Court is directed to "**flag**" this as a dismissal pursuant to 28 U.S.C. § 1915A(b).

SO ORDERED THIS 29th day of Sept., 1997.


THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

FILED

SEP 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURTIN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DAVID B. McDERMOTT, II,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
et al.,

Defendants.

Case No. 96-CV-313-B

("Base File")

✓ 96-CV-314-B, 96-CV-315-B, 96-CV-316-H,
96-CV-320-H, 96-CV-321-H, 96-CV-322-B,
96-CV-323-K, 96-CV-367-C, 96-CV-368-H,
96-CV-369-B, 96-CV-370-B, 96-CV-371-BU,
96-CV-404-H, 96-CV-405-BU, 96-CV-406-E,
96-CV-407-K, 96-CV-408-B, 96-CV-409-H,
96-CV-410-E, 96-CV-411-H, 96-CV-412-BU,
96-CV-413-K

ENTERED ON DOCKET

ORDERDATE 10-2-97

In January of 1996, Plaintiff, a federal prisoner appearing *pro se*, began filing weekly motions in his criminal case (93-CR-163-E) complaining of conditions at the Tulsa County Jail (TJC) where he was being held as a pre-trial detainee. On April 4, 1996, Judge Ellison entered an Order in Plaintiff's criminal case which stated as follows:

The claims raised in the above pleadings [docket #208, #210, #211, #213, #214, #216, #217, #223, #225, #226, #228, #229, #230, #238, #239, #240, #242, #247, #251, #252, #253, and #254] challenge the conditions of McDermott's confinement at the Tulsa County Jail, and relate only marginally to his criminal case. Therefore, the Court can more appropriately address these claims in a separate civil rights action.

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By the terms of an Order filed August 20, 1996, this Court granted Plaintiff's motions to proceed *in forma pauperis* and to amend his complaint. Plaintiff was to amend within fifteen (15) days to cure certain deficiencies specified in the Order and he was provided copies of the court-approved form for the purpose of amending his complaint. Subsequent to the entry of that Order, Plaintiff was transferred to different institutions and sought several extensions of time within which to file his amended complaint in compliance with the Court's Order of August 20, 1996.

On February 18, 1997, Plaintiff submitted his "amended civil rights complaint in behalf of David B. McDermott, II" (Docket #21). Prior to filing his amended complaint, Plaintiff requested extensions of time (Docket #s 18, 19 and 20). As Plaintiff has now filed his amended complaint, the Court finds that the requests for additional time are moot.

In the August 20, 1996 Order, the Court advised Plaintiff that his complaint would be screened for frivolity. Specifically, Plaintiff was advised that his claims for monetary damages against the United States of America were barred by sovereign immunity, that Plaintiff's claims would be barred unless he indicated that he had exhausted his administrative remedies, and that his claims

against Stanley Glanz, Tulsa County Sheriff, would be dismissed for failure to state a claim unless Plaintiff alleged that Glanz caused or participated in the alleged constitutional deprivation. The August 20, 1996 Order specifically stated that "[t]his action will be dismissed as frivolous or for failure to state a claim upon which relief can be granted unless Plaintiff files a second amended complaint . . . curing the deficiencies noted in this order." Also, the Clerk of Court sent Plaintiff a blank civil rights complaint form labeled "second amended complaint." However, Plaintiff failed to submit his amended complaint on the court-approved form.

After reviewing Plaintiff's amended civil rights complaint, the Court finds that Plaintiff again failed to submit his amended complaint on the court-approved form.¹ In addition, Plaintiff failed to cure all of the deficiencies specified in the August 20, 1996 Order. Specifically, he continues to seek monetary damages from the United States of America, fails to allege that Defendant Glanz caused or participated in the alleged constitutional deprivations, and fails to identify specific defendants who did cause or participate in the alleged constitutional deprivations. Therefore, the Court finds that Plaintiff's "amended civil rights complaint" should be dismissed without prejudice as frivolous, for failure to state a claim upon which relief can be granted and for failure to comply with this Court's August 20, 1996 Order.

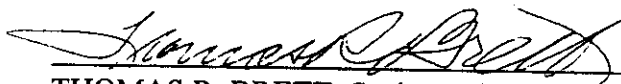
Each of Plaintiff's twenty-three (23) cases was consolidated for disposition with this case, 96-CV-313-B, as the "Base File." The dismissal of this case serves to terminate each of the associated cases. The Clerk of Court is directed to file a copy of this Order in each of the associated cases.

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ACCORDINGLY, IT IS HEREBY ORDERED that:

1. This case is **dismissed without prejudice** at this time. The Court may reopen Plaintiff's action if he submits to the Court, within thirty (30) days of the date of this Order, an amended petition prepared on the Court-approved form, along with the requisite number of copies, summons and Marshal forms, all in full compliance with the Information and Instructions for Filing Complaints under 42 U.S.C. § 1983 and N.D. LR 9.3(A).
2. Any and all pending motions are **moot**.
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SO ORDERED THIS 29th day of Sept., 1997.



THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 30 1997 *P*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DAVID B. McDERMOTT, II,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
et al.,

Defendants.

Case No. 96-CV-313-B

("Base File")

96-CV-314-B, 96-CV-315-B, 96-CV-316-H,
96-CV-320-H, 96-CV-321-H, 96-CV-322-B,
96-CV-323-K, 96-CV-367-C, 96-CV-368-H,
96-CV-369-B, 96-CV-370-B, 96-CV-371-BU,
96-CV-404-H, 96-CV-405-BU, 96-CV-406-E,
96-CV-407-K, 96-CV-408-B, 96-CV-409-H,
96-CV-410-E, 96-CV-411-H, 96-CV-412-BU,
96-CV-413-K

ENTERED ON DOCKET

DATE 10-2-97

ORDER

In January of 1996, Plaintiff, a federal prisoner appearing *pro se*, began filing weekly motions in his criminal case (93-CR-163-E) complaining of conditions at the Tulsa County Jail (TJC) where he was being held as a pre-trial detainee. On April 4, 1996, Judge Ellison entered an Order in Plaintiff's criminal case which stated as follows:

The claims raised in the above pleadings [docket #208, #210, #211, #213, #214, #216, #217, #223, #225, #226, #228, #229, #230, #238, #239, #240, #242, #247, #251, #252, #253, and #254] challenge the conditions of McDermott's confinement at the Tulsa County Jail, and relate only marginally to his criminal case. Therefore, the Court can more appropriately address these claims in a separate civil rights action.

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22

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ACCORDINGLY, IT IS HEREBY ORDERED that:

1. This case is **dismissed without prejudice** at this time. The Court may reopen Plaintiff's action if he submits to the Court, within thirty (30) days of the date of this Order, an amended petition prepared on the Court-approved form, along with the requisite number of copies, summons and Marshal forms, all in full compliance with the Information and Instructions for Filing Complaints under 42 U.S.C. § 1983 and N.D. LR 9.3(A).
2. Any and all pending motions are **moot**.
3. For purposes of counting "prior occasions" under 28 U.S.C. § 1915(g), the Clerk of the Court is directed to "**flag**" this as a dismissal pursuant to 28 U.S.C. § 1915A(b).

SO ORDERED THIS 29th day of Sept., 1997.


THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
SEP 30 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JONNIE MYERS,

Plaintiff,

v.

DEPARTMENT OF HUMAN
SERVICES,

Defendant.

Case No. 96-CV-684-H ✓

ENTERED ON DOCKET

DATE

10-1-97

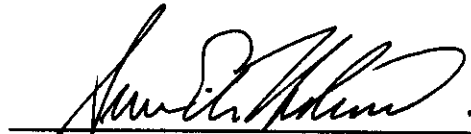
JUDGMENT

This matter came before the Court on a Motion for Summary Judgment by Defendant. The Court duly considered the issues and rendered a decision in accordance with the order filed on September 30, 1997.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Defendant and against Plaintiff.

IT IS SO ORDERED.

This 30TH day of September, 1997.



Sven Erik Holmes
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

S.J.B., INC., a Tennessee corporation,

Plaintiff,

vs.

NEWELL COACH CORPORATION,
an Oklahoma Corporation,

Defendant.

ENTERED ON DOCKET

DATE 10-1-97

Case No. 96-CV-1160-H

FILED

SEP 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL

COMES before the Court this 30th day of SEPTEMBER, 1997 the
Stipulation Of Dismissal With Prejudice submitted by the parties and after due consideration it
is hereby ordered as follows:

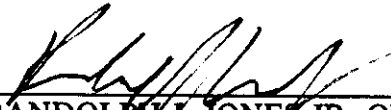
1. This case is hereby dismissed with prejudice with this Court reserving jurisdiction
to resolve any dispute which may arise between the parties to relation to or
arising from the Settlement Agreement entered into by the parties in settlement
of this matter.


SVEN ERIK HOLMES
U.S. DISTRICT COURT JUDGE

APPROVED AS TO FORM AND CONTENT:



Steven M. Harris, OBA #3913
Michael D. Davis, OBA #11282
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(918) 743-1276
Attorneys for Plaintiff SJB, Inc.



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2400 FIRST PLACE TOWER
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TULSA OK 74103-4391
(918) 586-8955
FAX: (918) 586-8547
Attorneys for Defendant
Newell Coach Corporation

852-2.034:nw

ENTERED ON DOCKET

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DATE 10-1-97

GARY LEE WALKER,

Plaintiff,

vs.

THE PRUDENTIAL INSURANCE
COMPANY, et al.,

Defendants.

No. 96-C-1058-K

FILED

SEP 30 1997

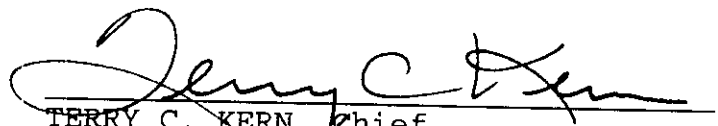
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

The Court has been advised that this action has settled or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 1 day of October, 1997.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE 10-1-97

VICTOR ROSE,

Plaintiff,

vs.

RON CHAMPION,
DOLORES RAMSEY, JIM RODEN,
STEVE MAXWELL, CINDY BETHEL,

Defendants.

Case No. 96-C-588-K ✓

F I L E D

SEP 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Plaintiff, appearing *pro se* and *in forma pauperis*, brought this civil rights action pursuant to 42 U.S.C. § 1983. Defendants have been served with process and have filed a motion to dismiss, or for summary judgment (#6). Plaintiff has responded.

Plaintiff's claims stem from misconduct charges for and conviction of violating an Oklahoma Department of Corrections (ODOC) policy prohibiting individual disruptive behavior. Plaintiff's alleged misconduct occurred on or about January 24, 1996. Plaintiff claims his due process rights were violated during the disciplinary hearing process. However, Defendants contend Plaintiff's due process rights were not violated, and furthermore, that the thirty days of disciplinary segregation did not implicate the due process clause under Sandin v. Conner, 115 S.Ct. 2293 (1995). Defendants argue they are entitled to qualified and Eleventh Amendment immunity. Defendants urge that the Complaint must be dismissed.

In addition to compensatory and punitive damages, Plaintiff requests that a special report be ordered and that the "misconduct be dismissed from his record," that he be "moved back to a minimum facility," and that his "earned level be returned" to him. (#1).

Special Report

Plaintiff is currently incarcerated at the Mack H. Alford Correctional Center in Stringtown, Oklahoma. However, at the time of the alleged misconduct, Plaintiff was incarcerated at the Dick Conner Correctional Center (DCCC) in Hominy, Oklahoma, and had been placed under restrictive housing ("RHU") as a result of a previous October 1995 misconduct conviction. On January 24, 1996, Lt. Jim Roden served a copy of the misconduct report on Plaintiff at the RHU. Apparently, a dispute arose between Roden and Plaintiff over whether or not Plaintiff had "checked" that he wanted "to call witnesses" in the space provided on the investigation form. Plaintiff was subsequently charged with "menacing," i.e., attempting to coerce administration to remove him from RHU. In reporting the incident, a typographical error was made, listing the place of the offense as RHU cell #154, rather than RHU cell #155. However, ODOC policy states that "clerical errors will not invalidate the report." Eventually a corrected report was delivered to Plaintiff with the provision that "a 24 hour extension given unless waived."

Because of Plaintiff's menacing behavior, DCCC officials confined Plaintiff to restrictive housing. He was not allowed to shower, exercise, or attend the disciplinary hearing held on January 30, 1996 because of his behavior. The offense report stated:

On 1-24-96 at approx 1.10 pm while this R/O was escorting I/M Rose, Victor #172663 from RHU cell #154 to the hearing room, I/M Rose stated to this R/O, "I'll be back on the yard and I won't have these handcuffs on and we will see about this shit then."

A plea of "not guilty" was entered for Plaintiff. The summary of facts of the investigation reveal that Plaintiff stated he was the one threatened by Lt. Roden, "that he didn't threaten anyone," that witness Brown #203555 said he didn't hear what either one of them said to each other, that witness C/O

Kenworthy stated he let I/M Rose out for disciplinary investigation, approximately one minute later I/M Rose returned from the hearing room, and told him that he (Lt. Roden) was threatening him (Rose). Based on the investigation, the disciplinary hearing officer found Plaintiff guilty and imposed 30 days in disciplinary segregation.

Plaintiff appealed to the Warden and to the ODOC Administrative Review Authority, Dolores Ramsey, both of whom denied his appeal and confirmed the disciplinary decision. Plaintiff argued that the offense report was incorrect as it listed cell #154 and not cell #155, that the Warden did "nothing" to correct the inaccuracy in the offense report and that he knew Plaintiff did not attend the hearing, that the disciplinary reviewing officer, Dolores Ramsey, failed to submit a corrected copy of the offense report even though she stated she would do so. Plaintiff claims he was deprived of liberty without due process by not allowing him to attend the disciplinary hearing, by not being able to call more than 2 witnesses, and by the ineffective assistance of the staff representative, Cindy Bethel, in obtaining statements from 3 listed witnesses. Plaintiff finally filed an administrative grievance with ODOC Deputy Director, Kathy Waters, who affirmed the disciplinary decision.

ANALYSIS

A. Dismissal for Failure to State a Claim

A court should dismiss a constitutional civil rights claim only if it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. See Meade v. Grubbs, 841 F.2d 1512 (10th Cir. 1988). For purposes of reviewing a complaint for failure to state a claim, all allegations in the complaint are presumed true and construed in a light most favorable to plaintiff. Id.; see also Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991).

Furthermore, *pro se* complaints are held to less stringent standards than pleadings drafted by lawyers and the court must construe them liberally. See Haines v. Kerner, 404 U.S. 519, 520 (1972).

B. Section 1983 Civil Rights Claim

To establish a claim under 42 U.S.C. § 1983, Plaintiff must demonstrate that his constitutional rights were violated by a person or persons acting under color of state law. The only constitutional right applicable under the facts of this case is Plaintiff's right to liberty as secured by the Fourteenth Amendment to the United States Constitution.

1. Disciplinary Segregation

Plaintiff must demonstrate that the imposition of 30 days in disciplinary segregation in some way implicated a liberty interest protected by the Fourteenth Amendment.

Discipline of an inmate by prison officials is a necessary part of and is incident to any sentence imposed on the inmate by a court of law. Disciplinary segregation in and of itself does not, however, implicate an inmate's liberty. Only when the segregation "imposes atypical and significant hardship on the inmate in relationship to the ordinary incidents of prison life" does it implicate an inmate's liberty. Sandin v. Conner, 115 S.Ct. 2293, 2301 (1985).

Plaintiff's *Complaint* contains no allegations which would support a finding by the Court that the disciplinary segregation to which he was subjected [30 days in restricted housing unit] was "atypical" or that it imposed a "significant hardship . . . in relation to the ordinary incidents of prison life." In short, Plaintiff's *Complaint* fails to demonstrate that the disciplinary segregation he received as punishment implicates his liberty. Having failed to demonstrate that the disciplinary segregation violates a constitutional right, Plaintiff's *Complaint* does not state a claim under 42 U.S.C. § 1983,

and therefore, the Court agrees Defendants' motion to dismiss should be granted. See Allison v. Kyle, 66 F.3d 71, 74 (5th Cir. 1995).

2. Transfer to Minimum Security Facility

Plaintiff does not have a constitutional right to be incarcerated in a particular cell or facility. See Olim v. Wakinekona, 461 U.S. 238, 245 (1983); Meachum v. Fano, 427 U.S. 215, 224 (1976); Moody v. Dagget, 429 U.S. 78, 88, n.9 (1976). Classification and placement decisions are entrusted to prison administrators, not federal courts. Moody, 429 U.S. at 88, n. 9; Meachum, 427 U.S. at 228. The Court finds that Plaintiff does not have a constitutional right to be incarcerated in a particular facility, or at a particular level of security.

C. Implications of Heck v. Humphrey

To the extent any of Plaintiff's claims were sufficiently pled to state a claim under 42 U.S.C. § 1983, even those due process claims are subject to dismissal under Heck v. Humphrey, 512 U.S. 477 (1994) and Edwards v. Balisok, 117 S.Ct. 1584 (1997). The Supreme Court has held that where an inmate's allegations necessarily imply the invalidity of the punishment imposed, the inmate cannot seek money damages for alleged deprivations arising out of a prison disciplinary hearing by commencing an action under § 1983 unless the results of that hearing already have been invalidated. Balisok, at 1588; see also Burnell v. Coughlin, 97-CV-6038L, 1997 WL 548736, at *5 (W.D. N.Y. Sept. 3, 1997).


CONCLUSION

Plaintiff has failed to allege elements essential to state a claim under § 1983. Therefore, the Court finds that Defendants' motion to dismiss for failure to state a claim should be granted.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Defendants' motion to dismiss for failure to state a claim (#6) is **granted**, and Plaintiff's *Complaint* is **dismissed with prejudice**.
2. All pending motions are **denied as moot**.
3. The Clerk is directed to **flag** this as a dismissal to be counted as a "prior occasion" under 28 U.S.C. § 1915(g).

SO ORDERED this 30th day of September, 1997.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE 10-1-97

GARSIL LAVELL BROWN, SR.,

Plaintiff,

vs.

RON CHAMPION, officially and
individually; CHARLIE ARNOLD,
DELORES RAMSEY,

Defendants.

Case No. 96-C-251-K

FILED

SEP 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Plaintiff, appearing *pro se* and *in forma pauperis*, brought this civil rights action pursuant to 42 U.S.C. § 1983.

Plaintiff's claims stem from misconduct charges for and conviction of Oklahoma Department of Corrections (ODOC) offense 05-4, lewd written communication to staff member. The alleged infraction occurred on or about November 30, 1995, while Plaintiff was incarcerated at Dick Conner Correctional Center (DCCC). Plaintiff's administrative appeal was denied and the misconduct conviction affirmed, resulting in the imposition of 30 days of disciplinary segregation. Plaintiff argues that (1) he did not write "the alleged letter" to the mailroom supervisor, Glenda Townley, (2) the Warden "had already" found Plaintiff guilty before the court date, (3) the misconduct charge was based on false evidence, (4) the Warden's transfer of Plaintiff to a Texas facility was motivated by retaliation, and (5) he was denied access to the courts and law library. Plaintiff seeks \$35,000 from each Defendant, requests a handwriting expert be appointed to view "the letter" in support of his claims, requests a determination of legal resources available at the Texas facility, and finally, requests

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"relief from prison and Oklahoma to never return to the State of Oklahoma." (#1).

Defendants filed their motion to dismiss, or in the alternative, for summary judgment (#10), arguing Plaintiff's due process rights were not violated. Defendants state Plaintiff has not established that he was transferred to the Texas facility in retaliation, or that he was denied access to the courts. Further, Defendants contend they are entitled to qualified and Eleventh Amendment immunity. On the basis of the court-ordered Special Report (#11), Defendants urge that the Complaint be dismissed because Plaintiff has failed to alleged the essential elements of a § 1983 claim.

SPECIAL REPORT

At the direction of the Court, Defendants filed a special report ("Special Report") in accordance with Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978). The Special Report (#11) indicates that:

1. Plaintiff is serving an 8 year sentence for a conviction in Tulsa County for burglary first degree while serving a consecutive sentence on two counts of first degree rape and forcible sodomy. (#11, Attachment A).
2. Plaintiff is in custody of the Oklahoma Department of Corrections.
3. On December 8, 1995, Plaintiff acknowledged receipt of the written charges against him for a misconduct of "menacing, 05-4(A)". The charge was the result of a sexually explicit letter received by DCCC mailroom supervisor, Glenda Townley. (#11, Attachment B, p. 7).
4. Plaintiff pled not guilty to the alleged misconduct, requested a hearing, and waived both presentment of witnesses as well as the services of a Staff Representative. (#11, Attachment B, p. 8-9).

5. On December 13, 1995, DCCC officials conducted a disciplinary hearing. Plaintiff was found guilty and sentenced to 30 days in disciplinary segregation and a \$15.00 fine. (#11, Attachment B, p. 8).

6. The disciplinary hearing decision was based on the statement of Chief of Security, Charlie Arnold. His conclusion was based on similarities between inmate Brown's handwriting, as evidenced by a copy of "another letter written by inmate Garsil Brown," and the handwriting found in the subject letter.

7. Plaintiff appealed the disciplinary decision to the Warden and to the Director/Designee, Delores Ramsey. Both concurred with the decision of the disciplinary hearing. (#11, Attachment D).

8. On January 5, 1996, in response to a letter from the wife of inmate Garsil Brown, Warden Champion explained that all documents had been reviewed, including the handwriting expert's analysis. Warden Champion stated he was satisfied that the disciplinary process provided was sufficient to determine the similarity between Brown's handwriting and that of the sexually explicit letter. (#11, Attachment G).

9. On January 29, 1996, Plaintiff was transferred to the Central Texas Parole Violator Facility, ("CTPV" facility), a private prison in San Antonio, Texas. (#11, Attachment A).

10. The CTPV facility maintains a law library which contains, among other books, the Supreme Court Reporter, Oklahoma Statutes Annotated, Oklahoma Decisions, and West Oklahoma Digests. (#11, Attachment K).

ANALYSIS

A. Dismissal for Failure to State a Claim

A court should dismiss a constitutional civil rights claim only if it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. See Meade v. Grubbs, 841 F.2d 1512 (10th Cir. 1988). For purposes of reviewing a complaint for failure to state a claim, all allegations in the complaint are presumed true and construed in a light most favorable to plaintiff. Id.; see also Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). Furthermore, *pro se* complaints are held to less stringent standards than pleadings drafted by lawyers and the court must construe them liberally. See Haines v. Kerner, 404 U.S. 519, 520 (1972).

B. Section 1983 Civil Rights Claim

To establish a claim under 42 U.S.C. § 1983, Plaintiff must demonstrate that his constitutional rights were violated by a person or persons acting under color of state law. The only constitutional right applicable under the facts of this case is Plaintiff's right to liberty as secured by the Fourteenth Amendment to the United States Constitution.

1. Disciplinary Segregation

In order to state a claim, Plaintiff must demonstrate that the imposition of 30 days in disciplinary segregation in some way implicated a liberty interest protected by the Fourteenth Amendment.

Discipline of an inmate by prison officials is a necessary part of and is incident to any sentence imposed on the inmate by a court of law. Furthermore, disciplinary segregation in and of itself does not implicate an inmate's liberty. Only when the segregation "imposes atypical and significant

hardship on the inmate in relationship to the ordinary incidents of prison life" does it implicate an inmate's liberty. Sandin v. Conner, 115 S.Ct. 2293, 2301 (1995).

Plaintiff's *Complaint* contains no allegations which would support a finding by the Court that the disciplinary segregation to which he was subjected [30 days in restricted housing unit] was "atypical" or that it imposed a "significant hardship . . . in relation to the ordinary incidents of prison life." In short, Plaintiff's *Complaint* fails to demonstrate that the disciplinary segregation he received as punishment implicates his liberty. Having failed to demonstrate that the disciplinary segregation violates a constitutional right, Plaintiff's *Complaint* does not state a claim under 42 U.S.C. § 1983, and therefore, Defendants' motion to dismiss should be granted.

2. Access to Courts

In order for a plaintiff to prevail on a denial of access-to-courts claim, as a general matter, an inmate alleging inadequate legal resources "must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a [nonfrivolous] legal claim." Lewis v. Casey, 116 S.Ct. 2174, 2180 (1996). The Court finds that Plaintiff has not alleged, nor shown, actual prejudice to the conduct of litigation. See Beville v. Ednie, 74 F.3d 210, 213 n.5 (10th Cir. 1996). Even taking Plaintiff's access-to-courts claim as true, the Court concludes Plaintiff has not shown an actual injury as a result of this denial. The only mention of injury Plaintiff makes is in reference to research for a post-conviction appeal. Therefore, Plaintiff's claim for denial of access to the courts must fail.

3. Transfer to Out-of-State Facility

Plaintiff does not have a constitutional right to be incarcerated in a particular cell or facility. See Olim v. Wakinekona, 461 U.S. 238, 245 (1983); Meachum v. Fano, 427 U.S. 215, 224 (1976);

Moody v. Dagget, 429 U.S. 78, 88 n.9 (1976). Classification and placement decisions are entrusted to prison administrators, not federal courts. Moody, 429 U.S. at 88 n.9; Meachum, 427 U.S. at 228. The Court finds that Plaintiff's constitutional rights were not violated by his transfer to an out-of-state prison facility.

4. Retaliation

To prevail on a claim of retaliation, plaintiff must do more than allege retaliatory conduct due to his exercise of a constitutional protected right; rather, he must show that "prison authorities' retaliatory action did not advance legitimate goals of the correctional institution or was not tailored narrowly enough to achieve such goals." Rizzo v. Dawson, 778 F.2d 527, 531-32 (9th Cir. 1985). The decision to transfer Plaintiff was a direct result of his inappropriate behavior toward an Oklahoma DOC staff member and the prison's re-evaluation of its security policy. The Court concludes Plaintiff has failed to produce any evidence of improper motive, and therefore, this claim must fail as well.

C. Implications of Heck v. Humphrey

To the extent any of Plaintiff's claims were sufficiently pled to state a claim under 42 U.S.C. § 1983, even those claims are subject to dismissal under Heck v. Humphrey, 512 U.S. 477 (1994) and Edwards v. Balisok, 117 S.Ct. 1584 (1997). The Supreme Court has held that where an inmate's allegations necessarily imply the invalidity of the punishment imposed, the inmate cannot seek money damages for alleged deprivations arising out of a prison disciplinary hearing by commencing an action under § 1983 unless the results of that hearing already have been invalidated. Balisok, at 1588; see also Burnell v. Coughlin, 97-CV-6038L, 1997 WL 548736, at *5 (W.D.N.Y. Sept. 3, 1997).

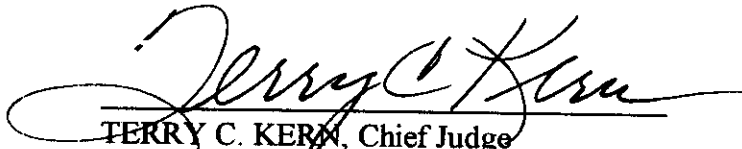
CONCLUSION

Plaintiff has failed to allege elements essential to state a claim under § 1983. Therefore, the Court finds that Defendants' motion to dismiss for failure to state a claim should be granted.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Defendants' motion to dismiss for failure to state a claim (#10) is **granted**, and Plaintiff's *Complaint* is **dismissed with prejudice**.
2. All pending motions are **denied as moot**.
3. The Clerk is directed to **flag** this as a dismissal to be counted as a "prior occasion" under 28 U.S.C. § 1915(g).

SO ORDERED this 30th day of September, 1997.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

SEP 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

WILLIAM D. CARPENTER,

Plaintiff,

v.

STANLEY GLANZ, et al.,

Defendants.

Case No: 97-C-152-BU

ENTERED ON DOCKET

DATE OCT 01 1997

ORDER AND REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

ORDER

This order and report and recommendation pertain to the Motion for Telephone Evidentiary Hearing before U.S. Magistrate Judge, from Defendant Mike Cherry to Serve as Martinez Report Interrogation (Docket #11), Plaintiff's Motion for Allowance of Proposed Subpoena or Alternative Motion for Order Requiring Defendants to File a Complete Special (Martinez) Report (Docket #12), the Motion for Order Allowing Service of Summons and Complaint by Plaintiff (Docket #13), the Special Report (Docket #15), the Motion for Summary Judgment in Favor of Plaintiff Pursuant to Rule 56(a) Federal Rules of Civil Procedure (Docket #16), Plaintiff's Motion for Enlargement of Time (Docket #17), Plaintiff's Motion for Order Setting Case for Trial by the Court (Docket #18), Plaintiff's Motion for Order Allowing Plaintiff to Proceed with Discovery (Docket #19), Defendant's Response Objecting to Plaintiff's Motion for Summary Judgment (Docket #23), the Motion for Summary Judgment in Favor of Plaintiff Pursuant to Rule 56(a) Federal Rules of Civil Procedure on Medical Claim

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Only (Docket #25), the Motion to Amend Original Complaint (Docket #26), and Defendant's Response to Motion for Summary Judgment in Favor of Plaintiff Pursuant to Rule 56(a) Federal Rules of Civil Procedure on Medical Claim Only (Docket #27). Plaintiff's complaint raises claims of excessive use of oleoresin capsicum spray, denial of medical treatment for resulting injury, and imposition of excessive punishment without due process, including loss of right to shower and to use the telephone.

The Motion for Telephone Evidentiary Hearing before U.S. Magistrate Judge, from Defendant Mike Cherry to Serve as Martinez Report Interrogation (Docket #11) is denied. Plaintiff claims that since defendant Mike Cherry ("Cherry") has been terminated from the Tulsa County Sheriff's Office and moved to Missouri, it is impossible for the Tulsa County District Attorney's Office to include Cherry in the Martinez Report ordered by the court on May 20, 1997. However, the court has reviewed the Martinez Report and finds that Cherry was interviewed in regards to Plaintiff's allegations (Special Report, Docket #15, pgs. 10-11, 13, 16-17 and related exhibits). There is therefore no merit to plaintiff's contention.

Plaintiff's Motion for Allowance of Proposed Subpoena or Alternative Motion for Order Requiring Defendants to File a Complete Special (Martinez) Report (Docket #12) is denied. Plaintiff seeks to serve a subpoena on defendants asking them to produce "all incident reports, o/c pepper gas reports, and medical reports/records of T.C.S.O. Inmate John Pellegrino" stemming from the January 16, 1997 pepper spray incident. The incident report and o.c. pepper gas incident report are attached as Exhibit "A" and "I" to the Special Report (Docket #15). The medical reports of John

Pellegrino, another inmate who was removed from his cell for medical treatment following the pepper gas incident, are not relevant to plaintiff's claim that he was refused medical care.

The Motion for Order Allowing Service of Summons and Complaint by Plaintiff (Docket #13) is denied. Plaintiff attaches documents which purport to show that he has served a summons and complaint by mail on defendant Cherry. Plaintiff claims that Cherry lives at Rt. 6, Box 4, Reeds Spring, Missouri. The return receipt shows that the mailing was received by "Leona Patrick." The court cannot determine from this information that service has been made on Cherry.

Plaintiff's Motion for Enlargement of Time (Docket #17) is moot. Plaintiff filed his Reply to Defendant's Answer and Special (Martinez) Report on August 7, 1997.

Plaintiff's Motion for Order Setting Case for Trial by the Court (Docket #18) is denied. A scheduling conference will be held and a trial date set once discovery in the case is complete.

Plaintiff's Motion for Order Allowing Plaintiff to Proceed with Discovery (Docket #19) is granted. Discovery is to commence now that the Special Report, defendant's answer, and plaintiff's response have been filed. However, no discovery requests are to be served without court approval. The court will entertain a motion to serve interrogatories or requests for admissions or production setting out with specificity the proposed interrogatories or requests for court review.

The Motion to Amend Original Complaint (Docket #26) is denied. Federal Rule of Civil Procedure 15 discusses the amendment of pleadings and 15(a) states:

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

The rule requires leave to amend to be freely given by the court in the absence of prejudice to the opposing party. The Supreme Court in Foman v. Davis, 371 U.S. 178, 182 (1962), stated:

In the absence of any apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. - the leave sought should, as the rules require, be "freely given."

See also, Hom v. Squire, 81 F.3d 969, 973 (10th Cir. 1996).

Defendant seeks to add a defendant, Robin Fagala, to this case. He has given no reason for his delay in seeking to add Mr. Fagala, and defendants would be prejudiced by allowing the addition of a defendant at this late date after the major portion of discovery has been completed.

REPORT AND RECOMMENDATION

The Motion for Summary Judgment in favor of Plaintiff Pursuant to Rule 56(a) Federal Rules of Civil Procedure (Docket #16) and the Motion for Summary Judgment in Favor of Plaintiff Pursuant to Rule 56(a) Federal Rules of Civil Procedure on Medical

Claim Only (Docket #25) should be denied. Summary judgment is appropriate if the moving party can demonstrate that there is no genuine issue as to any material fact, and entitlement to judgment as a matter of law. Rule 56(c), Fed.R.Civ.P.¹

The court has reviewed the reports, interviews, logs, and other documents in the Special Report and plaintiff's allegations. There are genuine issues of material

¹The court applies the well-established framework for analysis of summary judgment motions. "[T]he plain language of Rule 56(c) [Fed.R.Civ.P.] mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). If there is a complete failure of proof concerning an essential element of the non-movant's case, there can be no genuine issue of material fact because all other facts are necessarily rendered immaterial. Id. at 323.

A party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must affirmatively prove specific facts showing that there is a genuine issue of material fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). The Court stated that "the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Id. at 252.

The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts". Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585 (1986).


The record must be construed liberally in favor of the party opposing the summary judgment, but "conclusory allegations by the party opposing ... are not sufficient to establish an issue of fact and defeat the motion." McKibben v. Chubb, 840 F.2d 1525, 1528 (10th Cir. 1988). The Tenth Circuit requires "more than pure speculation to defeat a motion for summary judgment" under the standards set by Celotex and Anderson. Setliff v. Memorial Hospital of Sheridan County, 850 F.2d 1384 (10th Cir. 1988).

fact remaining relating to plaintiff's claims. There is an issue of whether the amount of oleoresin capicum spray dispensed by a detention officer was "excessive" when the spray was used on January 16, 1997 on two inmates who were fighting in a cell which adjoined the plaintiff's cell. There is also an issue of fact as to whether plaintiff showed signs of physical distress caused by the spraying incident - as did his cellmate, John Pellegrino - and was refused medical care. There is another issue of fact concerning whether plaintiff was restricted from phone and shower privileges. Exhibit "L" to the Special Report (Docket #15), and the floor activity logs, show that telephone privileges for his cell, S-3-8, were restricted for repeated violations of house keeping rules, but the logs also indicate that the two telephones that plaintiff allegedly had access to while he claims they were turned off recorded over two hundred calls being made and his federal public defender remembers speaking by phone with him twice during that time period. The sheriff's personal hygiene policies show that, even if someone is in "lock-down," they are given access to showers three times a week.

In summary, the Motion for Telephone Evidentiary Hearing before U.S. Magistrate Judge, from Defendant Mike Cherry to Serve as Martinez Report Interrogation (Docket #11), Plaintiff's Motion for Allowance of Proposed Subpoena or Alternative Motion for Order Requiring Defendants to File a Complete Special (Martinez) Report (Docket #12), the Motion for Order Allowing Service of Summons and Complaint by Plaintiff (Docket #13), Plaintiff's Motion for Order Setting Case for Trial by the Court (Docket #18), and the Motion to Amend Original Complaint (Docket

#26) are denied. Plaintiff's Motion for Enlargement of Time (Docket #17) is moot. Plaintiff's Motion for Order Allowing Plaintiff to Proceed with Discovery (Docket #19) is granted. The Motion for Summary Judgment in Favor of Plaintiff Pursuant to Rule 56(a) Federal Rules of Civil Procedure (Docket #16) and the Motion for Summary Judgment in Favor of Plaintiff Pursuant to Rule 56(a) Federal Rules of Civil Procedure on Medical Claim Only (Docket #25) should be denied.

Dated this 30th day of September, 1997.


JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

s:\orders\carpen152

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 30 1997 *pw*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,
on behalf of the Secretary of Veterans Affairs,

Plaintiff,

v.

WILLIAM H. BOND, Trustee of the
Virginia M. Bond Family Trust;
BANK OF INOLA;
COUNTY TREASURER, Tulsa County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma,

Defendants.

ENTERED ON DOCKET

DATE OCT 01 1997

CIVIL ACTION NO. 97-CV-0233-E ✓

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Veterans Affairs, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

Dated this 30th day of September, 1997.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

For Phil Bernhardt
PETER BERNHARDT, OBA #741
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

PB:css

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D

SEP 30 1997 *plw*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FRED PITTS,

Plaintiff,

vs.

LARRY A. FIELDS, et al.,

Defendants.

No. 96-CV-670-E ✓

ENTERED ON DOCKET

DATE OCT 01 1997

ORDER

In this civil rights action, Plaintiff, a state inmate appearing *pro se* and *in forma pauperis*, alleges that his due process rights were violated in a prison disciplinary proceeding which resulted in the loss of 180 days of earned credits, 30 days of disciplinary segregation, and transfer to maximum security prison. The Court liberally construes Plaintiff's complaint as a request to direct the Department of Corrections (DOC) to expunge his misconduct and to find that the DOC violated his due process rights.¹ Defendants have filed a motion to dismiss the civil rights complaint, or in the alternative, for summary judgment (#8). For the reasons discussed below, the Court finds that Plaintiff's complaint should be dismissed without prejudice.

¹As stated in the complaint, Plaintiff requests "(1) expungement from Plaintiff [sic] records the findings of guilt on the charge of conspiring with other inmates to smuggle narcotics into DCCC institution, for which the statement of reasons given by the disciplinary officer was constitutionally inadequate; (2) Plaintiff request that his earn [sic] good time credits be restored 180 days, for the failure to adequate [sic] state reasons why punishment was imposed." (#1 at 5).

BACKGROUND

On February 1, 1996, Plaintiff received an Offense Report and was charged with "Group Disruption" while he was incarcerated at the Dick Conner Correctional Center (DCCC) in Hominy, Oklahoma. Specifically, the alleged disruption occurred on or about January 24, 1996, at approximately 9:40 a.m., when "it was discovered through the course of an investigation that Plaintiff had conspired with other inmates in an on-going operation to smuggle narcotics into the DCCC." (#8, at 2-3) (Special Report (#9), Attachment B). The Investigation Report, prepared by Lt. Lorene Kramer, concluded the charge was sufficiently supported by the employee's statement, the confidential informant statement, and the written statement of reliability. (#9)

Plaintiff acknowledged receipt of the written statement of charges and waived presentment of witnesses and the services of a staff representative. Plaintiff was also placed in the restrictive housing unit (RHU). Plaintiff requested a hearing, which was set for February 6, 1996. (#9).

At the February 6, 1996, Disciplinary Hearing before Captain Maxwell, Plaintiff entered a plea of not guilty. However, based on the statement of the reporting employee, Bill McKenzie, and of the confidential informant, Captain Maxwell concluded Plaintiff was guilty of the charge (#9). Plaintiff exhausted his administrative remedies by appealing the disciplinary hearing decision to Warden Champion and to Officer Ramsey, both of whom affirmed the findings. Because of the "seriousness of the offense, ... the type of behavior, ... and as a deterrent (sic) to similar actions of this nature in the future," Plaintiff was sentenced to 30 days in disciplinary segregation and the loss of 180 days earned credits. (#9). Plaintiff was later transferred to James Crabtree Correctional Center (JCCC) at Helena, Oklahoma, where he is now incarcerated. (#10-2, Plaintiff's response to Defendants' motion to dismiss, at 2).

ANALYSIS

As a preliminary matter, the Court notes that "a state prisoner's claim for damages is not cognizable under § 1983 if a judgment in favor of the prisoner would necessarily imply the invalidity of his conviction or sentence, unless the prisoner can demonstrate that the conviction or sentence has previously been invalidated. Edwards v. Balisok, 117 S.Ct. 1584, 1588 (1997) (quoting Heck v. Humphrey, 114 S.Ct. 2364, 2372-2373 (1994)); see also Sheldon v. Hundley, 83 F.3d 231, 233 (8th Cir. 1996) (inmate could not bring § 1983 action until he had disciplinary action invalidated). In Edwards, the Supreme Court stated that in a prison disciplinary hearing where the claim alleged deceit and bias on the part of the hearing officer, a prisoner's claim necessarily implied invalidity of the deprivation of his good-time credits, and therefore, was not cognizable under § 1983.

Applying the Heck standard to this case, in order for Plaintiff to bring his § 1983 claims which would necessarily "imply the invalidity of the punishment imposed," he must first demonstrate that the disciplinary hearing decision has previously been invalidated. Heck, 114 S.Ct. at 2372. In other words, Plaintiff "must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254." Id. Pitts has presented no evidence of such a determination to this Court.

Notwithstanding, in this action Plaintiff requests, among other things, that the misconduct charge be expunged from his prison record and that his good-time credits (180 days) be restored. Such request lies in habeas because it challenges the length or duration of his confinement. Preiser v. Rodriguez, 411 U.S. 475, 487-490 (1973); Smith v. Maschner, 899 F.2d 940 (10th Cir. 1990). Plaintiff's action is in essence a request for a writ of habeas corpus under 28 U.S.C. § 2254.

Therefore, given Plaintiff's *pro se* status, the Court liberally construes Plaintiff's § 1983 complaint as a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. See Haines v. Kerner, 404 U.S. 519, 520-21 (1972).

Section 2254(b)(1) requires a petitioner to exhaust state remedies before seeking habeas relief unless it would be futile to do so. The United States Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 501 U.S. 722, 731 (1991). To exhaust a claim, Petitioner must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

Furthermore, the Oklahoma Court of Criminal Appeals has held that "an inmate has the writ of mandamus to force prison officials to insure due process within the Department of Corrections' disciplinary system and to force prison officials to provide for procedural due process . . . before revoking credits after they have been previously earned." Canady v. Reynolds, 880 P.2d 391, 397 (Okla.Crim.App. 1994).

In this case, there is no evidence that Plaintiff would be entitled to immediate release should the Court restore his lost good-time credits, nor is there any indication that Plaintiff "has been denied relief in the state courts." Plaintiff has an available state court remedy, a petition for writ of mandamus. Id. The Court finds, therefore, that the Plaintiff's application for writ of habeas

corpus should be dismissed without prejudice for failure to exhaust state remedies.

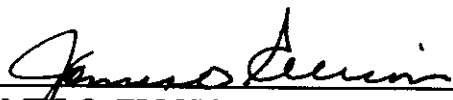
To the extent Plaintiff is seeking injunctive relief concerning the policies and practices of the state Department of Corrections, while "a prayer for such prospective relief will not 'necessarily imply' the invalidity of a previous loss of good-time credits, and so may properly be brought under § 1983, ...[t]o prevail ... plaintiff must establish standing and meet the usual requirements." (citations omitted) Edwards, 117 S.Ct. at 1589. Pitts has failed to establish the basic requisites to issuance of equitable relief, that is, the likelihood of substantial and immediate irreparable injury and the inadequacy of legal remedies. O'Shea v. Littleton, 94 S.Ct. 669, 677-678 (1974). The Court finds that in this case, Plaintiff is unable to meet the requirements for injunctive relief.

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Plaintiff's action, originally filed under 42 U.S.C. § 1983, is **treated** as a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.
- (2) Plaintiff's petition for writ of habeas corpus is **dismissed without prejudice** for failure to exhaust state remedies.
- (3) Defendants' motion to dismiss Plaintiff's § 1983 complaint, and/or for summary judgment (Docket #8) is **granted in part** as to dismissal of Plaintiff's § 1983 complaint, construed as a habeas petition, for failure to exhaust state remedies.

All other pending motions are denied as moot.

SO ORDERED THIS 30th day of September, 1997.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

KENT A. WHITE EAGLE,
SSN: 448-60-7459,

PLAINTIFF,

vs.

CASE No. 96-C-476-E

JOHN CALLAHAN, Acting
Commissioner of the Social
Security Administration,

DEFENDANT.

ENTERED ON DOCKET

DATE OCT 01 1997

JUDGMENT

This Court entered an Order on the 30th day of Sept, 1997, adopting the Report and Recommendation of the United States Magistrate Judge to affirm the captioned case.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Defendant and against the Plaintiff on this 30th day of Sept, 1997.


JAMES O. ELLISON
U.S. DISTRICT COURT SENIOR JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

SEP 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

KENT A. WHITE EAGLE,
SSN: 448-60-7459,

PLAINTIFF,

vs.

CASE No. 96-C-476-E

JOHN CALLAHAN, Acting
Commissioner of the Social
Security Administration,

DEFENDANT.

ENTERED ON DOCKET
DATE OCT 01 1997

ORDER

There being no objection, the Court adopts the Magistrate Judge's Report and Recommendation filed August 29, 1997. [Dkt. 10]. **THE COURT ORDERS THAT THIS CASE BE AFFIRMED** as outlined in the Magistrate Judge's Report and Recommendation.

Dated this 30th day of Sept., 1997.


JAMES O. ELLISON
U.S. DISTRICT COURT SENIOR JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

WILLETTE R. GRIFFIN,

Plaintiff,

vs.

CITY OF TULSA, OKLAHOMA

Defendant.

Case No. 95-C-1203-E


ENTERED ON DOCKET

DATE OCT 01 1997

JUDGMENT

In accord with the Order filed this date sustaining the Defendant's Motion to Dismiss, the Court hereby enters judgment in favor of the Defendant, City of Tulsa and against the Plaintiff, Willette R. Griffin. Plaintiff shall take nothing of her claim.

IT IS SO ORDERED THIS 30th DAY OF SEPTEMBER, 1997.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

L E D
SEP 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

WILLETTE R. GRIFFIN,

Plaintiff,

vs.

CITY OF TULSA, OKLAHOMA

Defendant.

Case No. 95-C-1203-E

ENTERED ON DOCKET

DATE OCT 01 1997

ORDER

Now before the Court is the Motion to Dismiss (Docket #29) of the defendant City of Tulsa.

In August of 1994, plaintiff, Willette Griffin, applied to the city for employment as a firefighter. Her performance on the "physical agility test" was determined to be inadequate and her application for employment was denied. She brings this action for sexual discrimination under a "disparate impact" theory, claiming that fewer women pass the physical agility test and it is not reasonably related to satisfactory job performance. Griffin seeks a declaratory judgment adjudicating the invalidity of the physical agility test and injunctive relief precluding the City from using the physical agility test in the future. At the pretrial of this matter, the City announced that a new test was being adopted and that the old test would not and could not be used as of September, 1997. Based on the adoption of a new test, the City seeks dismissal of this action, arguing that it is not justiciable, or moot.

The doctrine of mootness has been recently addressed in Green v. Branson, 108 F.3d (10th Cir. 1997). That court noted: "Article III's requirement that federal courts adjudicate only cases and controversies necessitates that courts decline to exercise jurisdiction where the award of any


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requested relief would be moot -- i.e. where the controversy is no longer live and ongoing." Id., at 1299 (quoting Cox v. Phelps Dodge Corp., 43 F.3d 1345 (10th Cir. 1994). The Court in Green dismissed plaintiff's claims for declaratory and injunctive relief against the state department of corrections based on the doctrine of mootness after he had been transferred to federal custody from state custody. The City argues that this case, like Green is moot because the matter about which plaintiff complains, the previous firefighter test, can no longer affect her. The City asserts, through the affidavit of Gordon Joens, that the test about which plaintiff complains is no longer being used, and that it cannot be used again because the test course has been cemented over.

In objecting to the City's motion to dismiss, plaintiff argues that "the City has not offered to enter into a consent decree precluding the use of its old test, nor has it agreed to submit its new testing procedure to the supervision of the court to insure that it does not continue to unfairly exclude female applicants." Plaintiff asserts, without any authority, that the City has a burden of demonstrating that its new test will not continue the discriminatory effect. Plaintiff's assertion is without merit. Plaintiff's evidence was that the old test had a disparate impact on females, and that the requirements of the old test were not reasonably related to the job in question. This contention is moot because that test is no longer being used by the City. Plaintiff has not attempted to demonstrate that the new test is in any way defective, and that issue is not properly before this Court.

The City's Motion to Dismiss (Docket #29) is granted.

IT IS SO ORDERED THIS 30th DAY OF SEPTEMBER, 1997.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

VIDEO COMMUNICATIONS, INC.,)

Plaintiff,)

vs.)

Case No. 96-C-260-E

BETTY HARRISON and LEO C.)

POPKIN, as Trustees of the Frances)

S. Poplin Irrevocable Trust, and as)

Co-Executors of the Harry M. Popkin)

Estate, and RICHARD BEHR, as)

conservator of the Estate of Frances S.)

Popkins, and Wade Williams,)

Defendants.)

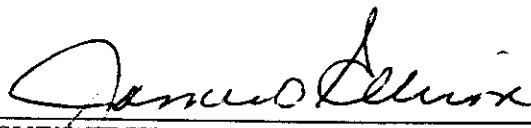
ENTERED ON DOCKET

DATE OCT 8 1997

ORDER OF DISMISSAL

COMES before the Court this 30th day of September, 1997 the
Stipulation Of Dismissal With Prejudice submitted by the parties and after due consideration it
is hereby ordered as follows:

1. This case is hereby dismissed with prejudice with this Court reserving jurisdiction
to resolve any dispute which may arise between the parties to relation to or
arising from the Settlement Agreement entered into by the parties in settlement
of this matter.


~~STEVEN ERIK HOLMES~~
U.S. DISTRICT COURT JUDGE

APPROVED AS TO FORM AND CONTENT:



Steven M. Harris, OBA #3913

Michael D. Davis, OBA #11282

DOYLE & HARRIS

2431 E. 61st St., Suite 260

Tulsa, OK 74136

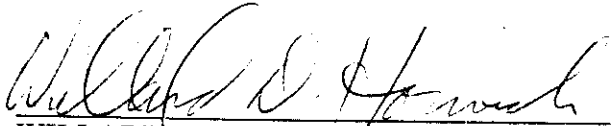
(918) 743-1276

Attorneys for Plaintiff - Video

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Attorneys for Third-Party Defendant

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WILLARD D. HORWICH

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(310-556-3378)

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759-18.047:nw

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

VIDEO COMMUNICATIONS, INC.,)

Plaintiff,)

vs.)

BETTY HARRISON and LEO C. POPKIN,)
as Trustees of the Frances S.)
Popkin Irrevocable Trust, and as)
Co-Executors of the Harry M.)
Popkin Estate, and RICHARD BEHR,)
as Conservator of the Estate of)
Frances S. Popkin,)

Defendants.)

BETTY HARRISON and LEO C. POPKIN,)
as Trustees of the Frances S.)
Popkin Irrevocable Trust, and as)
Co-Executors of the Harry M.)
Popkin Estate,)

Defendants-)
Counterclaimants,)

vs.)

VIDEO COMMUNICATIONS, INC.,)

Plaintiff-)
Counterdefendant.)

Case No. 96C 260E

ENTERED ON DOCKET

DATE OCT 01 1997

STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW the parties to the above-styled litigation by and through their counsel of record and hereby stipulate and agree as follows:

1. The Distribution Agreement made by and between Video Communications, Inc. and Harry M. Popkin on or about August 25, 1989 terminated on or about September 28, 1996;


2. The parties hereto have reached a settlement of all claims in this litigation;

3. The Complaint and the First Amended Complaint, and the Counterclaim, and all proceedings should be dismissed with prejudice;


4. The Court shall retain jurisdiction over the parties to resolve any dispute which may arise as to the Settlement Agreement entered into by the parties in settlement of these proceedings.

Respectfully submitted,

Dated: 9-29, 1997


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MICHAEL D. DAVIS, OBA #11282
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Defendant, Video Communications, Inc.
Attorneys for Third-Party Defendant
Bill F. Blair

Dated: September 23, 1997


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FAX: (310) 286-0865
Attorney for Defendants and
Counterclaimants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
SEP 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SAMUEL J. WILDER,

Plaintiff,

v.

FINCH INVESTMENTS, et al.,

Defendants.

Case No. 97-CV-347-H

ENTERED ON DOCKET

DATE 10-1-97


ORDER

This matter comes before the Court on Plaintiff's notice of removal (Docket #1) whereby Plaintiff seeks to remove to this Court several actions pending in the District Court of Tulsa County.

Removal jurisdiction can be conferred on a federal court only when a defendant removes a matter from a state forum to it. Ford Motor Credit Co. v. Liles, 399 F. Supp. 1282, 1284 (W.D.Okl. 1975) (construing 28 U.S.C. § 1441). Therefore, Plaintiff's notice of removal is insufficient to confer removal jurisdiction upon this Court, and this action must be dismissed. As a result, Plaintiff's remaining motions are dismissed as moot, and this matter is stricken from the docket.

IT IS SO ORDERED.

This 30TH day of September, 1997.


Sven Erik Holmes
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RANDY LEE KEITH, SR.,

Petitioner,

vs.

TULSA COUNTY,
STATE OF OKLAHOMA

Respondents.

ENTERED ON DOCKET

DATE 10-1-97

Case No. 96-CV-80-H

FILED

SEP 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent has filed a Rule 5 response (Docket #10) to the only remaining ground for relief, that Petitioner did not receive a fast and speedy trial, and urges that because Petitioner failed to comply with state procedural rules, he is barred from presenting this claim for federal review. Petitioner has replied. (Docket #11). As more fully set out below the Court concludes that this petition should be denied.

I. BACKGROUND

On October 12, 1993, Petitioner, currently on parole, pled nolo contendere to Arson in the Second Degree in Tulsa County District Court, Case No. CF-92-5512, and received a 12 ½ year sentence. Petitioner failed to file a timely direct appeal. However, he has filed five (5) applications for post-conviction relief in Tulsa County District Court. In his original petition for writ of habeas corpus filed in this case, Petitioner raised two grounds for relief: (1) he was denied a fast and speedy

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trial, and (2) the state trial court lacked jurisdiction after charges were refiled. Respondent filed a motion to dismiss the petition as a "mixed petition" since Petitioner had not exhausted his state remedies as to his second ground for relief. Petitioner then sought leave of court to amend his petition to strike the second ground for relief. This Court granted Petitioner's motion to amend, dismissed the second ground for relief and denied Respondent's motion to dismiss as moot. As stated supra, the only remaining ground for relief in the present petition for a writ of habeas corpus is Petitioner's claim that he was denied a speedy trial when he was detained in Tulsa County Jail for 383 days awaiting trial.

II. ANALYSIS

A. *Exhaustion*

As a preliminary matter, the Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Exhaustion of a federal claim may be accomplished by either (a) showing the state's appellate court had an opportunity to rule on the same claim presented in federal court, or (b) that at the time he filed his federal petition, he had no available means for pursuing a review of his conviction in state court. White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); see also Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), cert. denied, 475 U.S. 1020 (1986). The exhaustion doctrine is "principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings." Harris v. Champion, 15 F.3d 1538, 1554 (10th Cir. 1994) (quoting Rose v. Lundy, 455 U.S. 509, 518 (1982)).

Respondent concedes, and this Court finds, that the Petitioner meets the exhaustion

requirements under the law. The record provided by Respondent demonstrates that Petitioner presented his speedy trial claim to the Oklahoma Court of Criminal Appeals in the form of a Petition for Writ of Habeas Corpus, interpreted by the state appellate court as an appeal from the state district court's denial of Petitioner's fourth application for post-conviction relief. The Oklahoma Court of Criminal Appeals found that appeal to be untimely and dismissed the case for lack of subject matter jurisdiction.

The Court also finds that an evidentiary hearing is not necessary as the issues can be resolved on the basis of the record. See Townsend v. Sain, 372 U.S. 293, 318 (1963), overruled in part on other grounds, Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992). The granting of such a hearing is within the discretion of the district court, and this Court finds that a hearing is not necessary.

B. Procedural Bar

The alleged procedural default in this case results from Petitioner's numerous failures to raise timely his claim of denial of a speedy trial before the Oklahoma Court of Criminal Appeals. Respondent contends that Petitioner first defaulted his claim by failing to seek a timely withdrawal of his plea of nolo contendere, thereby failing to bring a direct appeal. According to Respondent, Petitioner next defaulted his claim when he failed to include that claim in his first application for post-conviction relief. Although Petitioner states in his reply that he did in fact raise this ground in his first application for post-conviction relief, Petitioner separately defaulted the claim by failing to appeal the state district court's denial of his first application to the Oklahoma Court of Criminal Appeals. Respondent contends that Petitioner first raised his claim of denial of a speedy trial in his third application for post-conviction relief, but that Petitioner also failed to appeal the district court's denial of the third application to the state's highest court. Finally, Respondent states that Petitioner again

raised the issue of denial of a speedy trial in his fourth application for post-conviction relief but that a default again occurred when he failed to bring his appeal of his fourth application for post-conviction relief within the time required under state procedural law.¹ As a result, the Oklahoma Court of Criminal Appeals declined jurisdiction, pursuant to Rules 5.2(C) and 10.1(C) of the Rules of the Court of Criminal Appeals, Okla. Stat. tit. 22, Ch. 18, App. (West 1994) and dismissed the appeal.

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state highest court declined to reach the merits of that claim on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 724 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir.), cert. denied, 115 S.Ct. 1972 (1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). "A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. A finding of procedural default is an adequate state ground if it has been applied evenhandedly "in the vast majority of cases." Id. (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991), cert. denied, 502 U.S. 1110 (1992)).

Applying these principles to the instant case, the Court concludes Petitioner's claims are barred by the procedural default doctrine. The state court's procedural bar as applied to Petitioner's claims was an "independent" state ground because "it was the exclusive basis for the state court's

¹Petitioner's appeal was in the form of a Petition for Writ of Habeas Corpus filed in the Oklahoma Court of Criminal Appeals.

holding." Maes, 46 F.3d at 985. Additionally, the procedural bar was an "adequate" state ground because the Oklahoma Court of Criminal Appeals has consistently declined to review claims which were not raised in a first request for post-conviction relief. Okla. Stat. tit. 22, § 1086.²

Because of his procedural default, this Court may not consider Petitioner's claim unless he is able to show cause and prejudice for the default, or demonstrate that a fundamental miscarriage of justice would result if his claims are not considered. See Coleman, 510 U.S. at 750. The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

Petitioner has not demonstrated that some objective factor external to the defense impeded his efforts to comply with the state procedural rules. Nor has he alleged the discovery of new evidence, a change in the law, or interference by state officials to excuse his failure to comply with state procedural rules.

Petitioner's only other means of gaining federal habeas review is a claim of actual innocence under the fundamental miscarriage of justice exception. Herrera v. Collins, 113 S.Ct. 853, 862

²Even if Petitioner raised his speedy trial claim in his first application for post-conviction relief, he was procedurally barred from raising the claim in subsequent post-conviction applications because he failed to appeal the district court's denial of the first application to the Oklahoma Court of Criminal Appeals. See Randle v. Hargett, No. 92-6194, 1992 WL 403115 (10th Cir. Dec. 29, 1992) (unpublished opinion, copy attached).

(1993); Sawyer v. Whitley, 112 S.Ct. 2514, 2519-20 (1992). Petitioner, however, does not claim that he is actually innocent of the crime at issue in this habeas action. Therefore, the Court concludes that Petitioner's claim of denial of a speedy trial is procedurally barred.


III. CONCLUSION

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States.

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for a writ of habeas corpus be **denied**. Any pending motions are **denied as moot**.

IT IS SO ORDERED.

This 29TH day of September, 1997.



Sven Erik Holmes
United States District Judge

(Cite as: 986 F.2d 1428, 1992 WL 403115 (10th Cir.(Okla.)))

NOTICE: Although citation of unpublished opinions remains unfavored, unpublished opinions may now be cited if the opinion has persuasive value on a material issue, and a copy is attached to the citing document or, if cited in oral argument, copies are furnished to the Court and all parties. See General Order of November 29, 1993, suspending 10th Cir. Rule 36.3 until December 31, 1995, or further order.

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter.)

Clydell RANDLE, Petitioner-Appellant,
v.
Steve HARGETT, Respondent-Appellee.

No. 92-6194.

United States Court of Appeals, Tenth Circuit.

Dec. 29, 1992.

W.D.Ok., No. 91-CV-1371.

W.D.Ok.

APPEAL DISMISSED.

Before SEYMOUR, STEPHEN H. ANDERSON and
BALDOCK, Circuit Judges. [FN*]

ORDER AND JUDGMENT [FN**]

BALDOCK, Circuit Judge.

****1** Petitioner Clydell Randle appeals the district court's denial of his petition for writ of habeas corpus, moves for leave to proceed in forma pauperis, and applies for a certificate of probable cause. 28 U.S.C. § 2254. We have jurisdiction under 28 U.S.C. § 2253.

A jury in the District Court of Oklahoma County, Oklahoma, found Petitioner guilty of rape and sentenced him to 199 years imprisonment. At sentencing on June 30, 1978, Petitioner pleaded guilty to four other felony offenses and was sentenced to 35 years imprisonment for each guilty plea offense, with the 35- year sentences running concurrently with each

other and with his rape sentence. Also at this sentencing hearing, Petitioner completed factual summary forms for all five offenses. The factual summary of Petitioner's rape conviction was on one form, and the factual summaries of his guilty plea offenses were on another form. The summary of facts form for the rape conviction clearly advised Petitioner of his right to appeal, and explained the procedures he must follow to perfect an appeal, including his right to court appointed counsel and his right to a transcript at state expense. On this form, Petitioner indicated that he understood the rights explained to him and that his answers to questions on the form were freely and voluntarily given. Petitioner stated in two places on the form that he did not wish to appeal his rape conviction, and additionally stated that he did not wish to have an attorney appointed for his appeal nor did he want a transcript provided at state expense. Pursuant to established procedure, Petitioner, as well as his attorney, the district attorney, and the trial judge, signed the factual summary form.

Petitioner did not appeal his rape conviction, but on May 18, 1989, eleven years after his sentence was imposed, he filed his first application for post-conviction relief in the Oklahoma trial court, alleging that he was denied his right to a direct appeal due to ineffective assistance of counsel. [FN1] The trial court denied the post-conviction application, finding that Petitioner had been advised of his right to appeal and had not shown sufficient reason for bypassing his direct appeal. Although the Oklahoma district court's order denying the application advised Petitioner of the procedures he must follow in order to appeal the denial of post-conviction relief to the Oklahoma Court of Criminal Appeals, Petitioner failed to appeal the denial of this first post- conviction application.

On February 20, 1991, Petitioner filed a second application for post- conviction relief in Oklahoma district court asserting ineffective assistance of counsel in that his failure to directly appeal his conviction in 1978 was the fault of his attorney, whom Petitioner had paid to file the appeal but who had failed to do so. The trial court denied this second post-conviction application, and the Oklahoma Court of Criminal Appeals affirmed the denial on appeal, applying a procedural bar to Petitioner's claims. The Court of Criminal Appeals found that Petitioner raised the same issue in his second application that he raised in his first application and that he knowingly waived

his right to appeal the first application's denial.

****2** Petitioner filed his first federal habeas petition on August 27, 1991, and the United States District Court for the Western District of Oklahoma adopted the magistrate's findings and conclusions, holding that "Petitioner's claims [were] barred because of the procedural default in state court." We affirm the district court's decision using substantially the same reasoning as used in the magistrate's report.

In *Coleman v. Thompson*, 111 S.Ct. 2546 (1991), the Supreme Court held that "in all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Id.* at 2565. In order to show "miscarriage of justice," a petitioner must show actual innocence. *Sawyer v. Whitley*, 112 S.Ct. 2514, 2519 (1992).

Petitioner has defaulted his federal claim in state court pursuant to an independent and adequate state procedural rule. In Petitioner's first post-conviction application in Oklahoma district court, he raised a claim of ineffective assistance of counsel which the Oklahoma district court denied. However, Petitioner failed to appeal the denial. Because he failed to appeal the denial of his first post-conviction application, the Oklahoma Court of Criminal Appeals found that he was procedurally barred under Oklahoma law from raising the ineffective assistance of counsel claim in a subsequent post-conviction application. Okla.Stat. Ann., tit. 22, § 1086 (West 1986).

Petitioner's only attempt to show cause in federal district court for his failure to appeal the denial of his first post-conviction petition was his assertion that he was transferred to another correctional facility, and the law library supervisor failed to transfer Petitioner's legal documents and records to the new facility. We hold that this does not show cause for his failure to appeal the ineffective assistance of counsel claim, because it was not necessary that Petitioner possess all of his legal documents in order to file a Notice of Appeal. See *McCoy v. Newsome*, 953 F.2d 1252, 1260 (11th Cir.), cert. denied, 112 S.Ct. 2283 (1992) (petitioner did not allege sufficient cause

when he claimed that he was denied opportunity to examine trial transcript because he failed to show that "there were not available to him alternative devices that would have fulfilled the same functions"). Therefore, Petitioner is barred from raising the ineffective assistance of counsel claim on federal habeas.

Petitioner's only other means of gaining federal habeas review is a claim of actual innocence. *Sawyer*, 112 S.Ct. at 2519. However, in his § 2254 petition to the federal district court, Petitioner did not claim actual innocence, but contested only the enhancement of his sentence.

****3** In the absence of a "rational argument in law or fact," petitioner's request to proceed in forma pauperis is DENIED. See *Neitzke v. Williams*, 490 U.S. 319, 323 (1989); 28 U.S.C. § 1915(d). Petitioner has failed to make a substantial showing of the denial of a federal right, see *Lozada v. Deeds*, 111 S.Ct. 860, 861-62 (1991); thus, petitioner's request for a certificate of probable cause, 28 U.S.C. § 2253, is DENIED, and the appeal is DISMISSED.

SO ORDERED.

FN* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed.R.App.P. 34(a); 10th Cir.R. 34.1.9. The case therefore is ordered submitted without oral argument.

FN** This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir.R. 36.3.

FN1. After reviewing the record, it is unclear to us whether Petitioner's first state post-conviction application raised the issue of ineffective assistance of counsel. It is also unclear to us after reviewing the Oklahoma district court's denial of Petitioner's first post-conviction application whether the district court addressed the ineffective assistance of counsel issue in denying Petitioner relief. However, it is clear after reviewing both the Oklahoma district court's denial of Petitioner's second state application for post-conviction relief and the Oklahoma Court of Criminal Appeals' affirmance of that denial that both Oklahoma courts found that his first petition raised an ineffective assistance of counsel claim which the Oklahoma district court denied, thereby creating a procedural bar to a second petition raising the same

(Cite as: 986 F.2d 1428, 1992 WL 403115, **3 (10th Cir.(Okla.)))

ineffective assistance of counsel claim.
Okla.Stat. Ann., tit. 22, § 1086 (West 1986). We
defer to the Oklahoma Court of Criminal Appeals'
interpretation.

END OF DOCUMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE 10-1-97

FILED

SEP 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

STEPHEN MELONAKIS,

Petitioner,

vs.

RITA MAXWELL, Warden,

Respondent.

Case No. 96-CV-661-H

ORDER

Petitioner, a state prisoner appearing *pro se*, paid the filing fee to commence this action pursuant to 28 U.S.C. § 2254. Respondent has filed a motion to dismiss for failure to exhaust state remedies (Docket #4). Petitioner has filed an objection to Respondent's motion to dismiss.

I. BACKGROUND

Petitioner contends that at a prison disciplinary hearing, Respondent deprived him of 365 earned credits without affording due process in violation of the due process clause of the Fourteenth Amendment to the United States Constitution. Specifically, Petitioner challenges the reliability of a confidential informant statement used to convict him of the misconduct. Petitioner states that he has "exhausted administrative remedies and no viable state method for review is available" (citing Canady v. Reynolds, 880 P.2d 391 (Okla. Crim. App. 1994)). In his prayer for relief, Petitioner requests that "the sanctions imposed upon him be removed and the credit loss he suffered of 365 days be restored which will herein entitle him to immediate release."

In her motion to dismiss, Respondent urges the Court to dismiss this action for failure to exhaust state remedies. Also relying on the authority of Canady, Respondent argues that Petitioner has an available state remedy, a writ of mandamus. For the reasons discussed herein, the Court agrees with Respondent.

II. ANALYSIS

A. *Exhaustion*

A federal court is prohibited from issuing a writ of habeas corpus on behalf of a prisoner in state custody unless the prisoner demonstrates either (1) that he "has exhausted the remedies available in the courts of the State," (2) that "there is an absence of available State corrective process," or (3) that "circumstances exist that render such process ineffective to protect the rights of the [prisoner]." 28 U.S.C. § 2254(b)(1)(A) and (B). A prisoner "shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c). See Picard v. Conner, 404 U.S. 270 (1971) (discussing § 2254's exhaustion requirement).

The exhaustion requirement is designed to give states the initial opportunity to address and correct their own alleged violations of federal law and is satisfied only when the prisoner seeking habeas relief has "fairly presented" the facts and the legal theory (i.e., the "substance") supporting his federal claims to the state's highest court. Picard, 404 U.S. at 275-76. See also, Coleman v. Thompson, 501 U.S. 772 (1991); Rose v. Lundy, 455 U.S. 508 (1982); Duckworth v. Serrano, 454 U.S. 1 (1981); Darr v. Burford, 339 U.S. 200 (1950). Exhaustion in a state court is not required if the state provides absolutely no opportunity to obtain redress or if the opportunity actually provided by the state is so clearly deficient as to render futile any effort to obtain relief. See 28 U.S.C. § 2254.

B. *Oklahoma Law Provides and Available and Adequate Remedy*

Petitioner argues that he has exhausted his administrative remedies and that, pursuant to Canady, he has no available remedy under Oklahoma law. The Court finds that Petitioner's

interpretation of Canady is wrong. According to Canady, at 400, "the inmate has the writ of mandamus to force prison officials to provide him with constitutional procedural due process, including proper notice and a hearing before revoking credits after they have been previously earned." (citing Waldon v. Evans, 861 P.2d 311, 313 (Okla. Crim. App. 1993). See also Johnson v. Department of Corrections, 916 P.2d 264, 265 (Okla. Crim. App. 1996). In addition, "[t]he inmate also has a complaint at such time as he or she is entitled to immediate release; and this Court has held the [state] writ of habeas corpus is appropriate in that instance." Canady, at 400 (citing Waldon, at 313; Ekstrand v. State, 791 P.2d 92, 95 (Okla. Crim. App. 1990)).

In the instant case, Petitioner challenges the reliability of the confidential informant statement relied upon by prison officials to convict him of the alleged misconduct. "Without sufficient indicia of reliability, the testimony of the confidential informants can be given no weight, and the requirements of due process as set forth in Hill are not satisfied." Taylor v. Wallace, 931 F.2d 698, 702 (10th Cir. 1991) (referring to Superintendent, Mass. Correctional Inst. v. Hill, 472 U.S. 445 (1985) (holding that the requirements of due process are satisfied only if there is "some evidence" to support the disciplinary tribunal's decision)). As Petitioner's claim is grounded on the argument that prison officials failed to provide him with minimum due process at his prison disciplinary hearing, his claim is precisely the type appropriately brought before the Oklahoma Courts in a petition for writ of mandamus. If Petitioner would be entitled to immediate release if his earned credits are restored, his available state remedy is a petition for writ of habeas corpus.

Because Petitioner has an available state remedy, he must first exhaust that remedy before seeking relief in this Court. 28 U.S.C. § 2254(b)(1)(A) and (c).

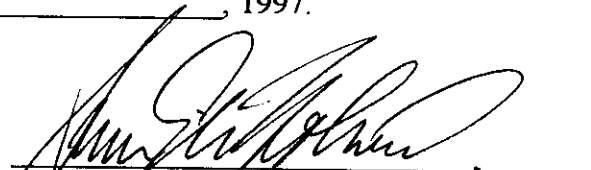
III. CONCLUSION

Petitioner must exhaust his available state remedy before seeking habeas relief in federal court. Oklahoma courts will review Petitioner's claim that he was denied due process at his disciplinary hearings via either a petition for writ of mandamus or, if Petitioner alleges he would be entitled to immediate release, a petition for writ of habeas corpus. The Court finds that Respondent's motion to dismiss should be granted and this action dismissed without prejudice for failure to exhaust state remedies.

ACCORDINGLY, IT IS HEREBY ORDERED that Respondent's motion to dismiss (Docket #4) is **granted**. This action is **dismissed without prejudice** for failure to exhaust state remedies.

IT IS SO ORDERED.

This 29TH day of SEPTEMBER, 1997.


Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**FILED**

SEP 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LONNIE GRAVES,

Plaintiff,

vs.

RON CHAMPION,

Defendant.

No. 96-C-213-H

ORDER

BEFORE the Court is Defendant's motion to dismiss Plaintiff's "Judicial Notice" for failure to state a claim upon which relief can be granted. Plaintiff, appearing *pro se* and *in forma pauperis*, has objected. For the reasons stated below, the Court concludes that Defendant's motion to dismiss should be granted.

I. BACKGROUND

On March 18, 1996, Plaintiff filed a document entitled "Judicial Notice"¹ requesting an order directing Defendant to allow Plaintiff to use his trust fund savings account for "fees and costs in filing a civil or criminal action."² (#1) Plaintiff states that certain policies of the Oklahoma Department of

¹On April 11, 1996, the Court directed the Clerk to docket this case as a civil rights complaint.

²Title 57, section 549, of the Oklahoma Statutes, provides, in part:

A. The State Board of Corrections shall have the following powers and duties with respect to the operation of prison industries, the Construction Division, and administration of inmate trust funds:

5. The duty to establish the percentages of such wages which shall be available for apportionment to inmate savings . . . Provided that not less than twenty percent (20%) of such wages shall be placed in an account, payable to the prisoner upon his or her discharge or upon assignment to a pre-release program. Funds from this account may be used by the inmate for fees or costs in filing a civil or criminal action as defined in Section 151 et seq. of Title 28 of the Oklahoma Statutes or for federal action as defined in Section 1911 et seq. of Title 28 of the United States Code, 28 U.S.C., Section 1911 et seq.

Corrections (ODOC) require him to pay for photocopies, mailing fees, envelopes, medical visits and drugs from his trust savings account. Although Plaintiff contends he has \$475.38³ in his trust fund savings account, he desires to use these funds to secure the services of an attorney.

Defendant, Ronald J. Champion, has moved the Court to dismiss this action under authority of Rule 12(b)(6) for failure to state a claim. Defendant has also filed the court-ordered report pursuant to Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978). Defendant contends that Plaintiff has failed to allege any rights that are being violated or of which he is being deprived. Further, Defendant contends that Plaintiff does not allege that he is not receiving any of these things ("photocopies, mailing fees, envelopes, medical visits, drugs, hygienic supplies") for the reason he cannot pay for them. Plaintiff merely states he is being charged for them and he wants to use his money for another purpose. Consequently, Defendant argues these statements do not equate to a constitutional deprivation or do not indicate a violation of a constitutionally guaranteed right. The Court agrees.

II. ANALYSIS

Title 42 U.S.C. § 1983 provides individuals a federal remedy for deprivation of their rights secured by the Constitution and laws of the United States. See Dixon v. City of Lawton, 898 F.2d 1443, 1447 (10th Cir. 1990). For a complaint under section 1983 to be sufficient a plaintiff must allege two prima facie elements: that defendant deprived him of a right secured by the Constitution

³The special report indicates that as of September 3, 1996, Plaintiff had "\$0.00 in draw money and \$486.02 in mandatory savings." (#7)

and laws of the United States,⁴ and that defendant acted under color of law.⁵ Adickes v. S. H. Kress & Co., 398 U.S. 144, 150 (1970). Federal Rule of Civil Procedure 8(a) sets up a liberal system of notice pleading in federal courts. This rule requires only that the complaint include a short and plain statement of the claim sufficient to give the defendant fair notice of the grounds on which it rests. Leatherman v. Tarrant Cty. Narcotics Unit, 507 U.S. 163, 168 (1993) (rejecting heightened pleading requirements in civil rights cases against local governments). If plaintiff's complaint demonstrates both substantive elements it is sufficient to state a claim under section 1983. Id.; Meade v. Grubbs, 841 F.2d 1512, 1526 (10th Cir. 1988).

A court should dismiss a constitutional civil rights claim only if it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. Meade, 841 F.2d at 1526 (citing Owens v. Rush, 654 F.2d 1370, 1378-79 (10th Cir. 1981)). For purposes of reviewing a complaint for failure to state a claim, all allegations in the complaint must be presumed true and construed in a light most favorable to plaintiff. Id.; Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). While pro se complaints are held to less stringent standards and must be liberally

⁴The rights set forth in the Bill of Rights are held exclusively by the states, secured from infringement by the federal government. Flagg Bros. v. Brooks, 436 U.S. 149 (1978). Therefore, constitutional civil rights claims of individuals apply to the states only through the Fourteenth Amendment and require state action to afford relief under section 1983. See Monroe v. Pape, 365 U.S. 167 (1961), overruled on other grounds, Monell v. Dept. of Social Services, 436 U.S. 658 (1978). The state action test requires: (1) that the deprivation be caused by the exercise of a right or privilege created by the state or by a person for whom the state is responsible, and (2) that the actor must be someone who is a state actor. Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982).

⁵There is an overlap between the state action requirement under the Fourteenth Amendment and action under color of law. See Lugar, 457 U.S. at 926. Where the plaintiff has already demonstrated state action under the first element the necessity to show action under color of law is also satisfied.

construed, nevertheless, the Court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations. Haines, 404 U.S. at 520; Hall, 935 F.2d at 1110.

In the instant case, Plaintiff has completely failed to allege a deprivation of a right secured by the Constitution of the United States or to identify any conduct by Defendant which violates his constitutionally protected rights. It seems Plaintiff merely disagrees with the limitations imposed by state statute and ODOC policies on distribution of funds from his mandatory savings account. Regardless of Plaintiff's disagreement, however, the actions of ODOC officials are consistent with the relevant state statute and ODOC policies. Plaintiff has not alleged that the statute and policies are unconstitutional. Therefore, construing Plaintiff's *Judicial Notice* liberally in accord with his pro se status, the Court concludes that Plaintiff has failed to establish an essential element: that defendant deprived him of a right secured by the Constitution and laws of the United States. Plaintiff has failed to state a claim upon which relief can be granted, and accordingly, Defendant's motion to dismiss should be granted.

III. CONCLUSION

After liberally construing the allegations in the *Judicial Notice* in the light most favorable to Plaintiff, Haines v. Kerner, 404 U.S. 519, 520 (1972), the Court concludes that Plaintiff has failed to allege a deprivation of a right secured by the Constitution of the United States. See Baker v. McCollum, 443 U.S. 137 (1979); see also Wilhelm v. Gray, 766 P.2d 1357, 1358 (Okla. 1989). Therefore, Defendant's motion to dismiss should be granted and Plaintiff's complaint should be dismissed.

ACCORDINGLY, IT IS HEREBY ORDERED that Defendant's motion to dismiss (doc. #6) is **granted**, and this action is dismissed with prejudice. Any and all pending motions are **denied** as moot.

IT IS SO ORDERED.

This 29TH day of SEPTEMBER, 1997.

A handwritten signature in black ink, appearing to read 'Sven Erik Holmes', written over a horizontal line.

Sven Erik Holmes
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GERARD D. ANDERSON, et al.

Plaintiff,

v.

ALLSTATE INSURANCE CO.,

Defendant.

Case No. 97-C-597(H)

FILED

SEP 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE 10-1-97

ORDER

This matter comes before the Court on Defendant's petition for removal.¹ Plaintiff originally brought this action in the District Court for Tulsa County. Plaintiff's petition alleges one cause of action for breach of contract, claiming damages of \$5,425.00, and one cause of action for bad faith dealing, alleging financial loss and emotional damages in excess of \$10,000.² Defendant Allstate Insurance Company ("Allstate") filed a petition for removal stating that

¹ In pertinent part, the statute governing "procedure for removal" states that:

[t]he United States district court in which [the notice for removal] is filed shall examine the notice promptly. If it clearly appears on the face of the notice and any exhibits annexed thereto that removal should not be permitted, the court shall make an order for summary remand.

If the United States district court does not order the summary remand of such prosecution, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the prosecution as justice shall require.

See also 28 U.S.C. § 1447(c) (procedure after removal) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.").

² In Oklahoma, the general rules of pleading require that:

[e]very pleading demanding relief for damages in money in excess of Ten Thousand Dollars (\$10,000.00) shall, without demanding any specific amount of money, set forth only that the amount sought as damages is in excess of Ten Thousand Dollars (\$10,000.00), except in actions sounding in contract.

Okla. Stat. Ann. tit. 12, § 2008(2) (West 1993).

removal is proper on the basis of diversity jurisdiction. Plaintiff filed a motion to remand the action, contending that Defendant failed to offer any facts to support its allegation that the jurisdictional amount in controversy exceeded \$75,000. Defendant responded to Plaintiff's contentions by filing a motion for an extension of time to answer Plaintiff's motion to remand to allow it time to conduct discovery to determine the amount of Plaintiff's damages. Plaintiff objected to Defendant's request. Finally, Defendant has filed a supplemental brief in support of its request for an extension of time to respond, with Plaintiff's responses to discovery attached. In its responses to Defendant's discovery, Plaintiff has stated that it has not yet determined the amount of its damages, and cannot do so until discovery is concluded. It appears that complete diversity of citizenship exists between the parties. The question remaining for the Court is whether the jurisdictional amount is satisfied under 28 U.S.C. § 1332(a).

Initially, the Court notes that federal courts are courts of limited jurisdiction. Further, "[d]efendant's right to remove and plaintiff's right to choose his forum are not on equal footing; for example, unlike the rules applied when plaintiff has filed suit in federal court with a claim that, on its face, satisfies the jurisdictional amount, removal statutes are construed narrowly; where plaintiff and defendant clash about jurisdiction, uncertainties are resolved in favor of remand."

Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994).

In order for a federal court to have diversity jurisdiction, the amount in controversy must exceed \$75,000. 28 U.S.C. § 1332(a). The Tenth Circuit has clarified the analysis which a district court should undertake in determining whether an amount in controversy is greater than \$75,000. The Tenth Circuit stated:

[t]he amount in controversy is ordinarily determined by the allegations of the complaint, or, where they are not dispositive, by the allegations in the notice of removal. (citation omitted). The burden is on the party requesting removal to set forth, in the notice of removal itself, the "underlying facts supporting [the] assertion that the amount in controversy exceeds \$[75,000]." (citation omitted) Moreover, there is a presumption against removal jurisdiction. (emphasis in original)

Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir.), cert. denied, 116 S. Ct. 174 (1995); e.g., W.L. Hughes & Lucille A. Hughes v. E-Z Serve Petroleum Marketing Co., No. 95-C-1240-H (N.D. Okla. 1996) (applying Laughlin and remanding case); Melissa F. Martin v. Missouri Pacific R.R. Co. d/b/a Union Pacific R.R. Co., No. 95-C-289-H (N.D. Okla. 1996) (same); Herber v. Wal-Mart Stores, 886 F. Supp. 19, 20 (D. Wyo. 1995) (same); Lawrence J. Homolka v. Hartford Ins. Group, Individually and d/b/a Hartford Underwriters Ins. Co., No. 95-C-727(H) (N.D. Okla. 1995) (same); Travis Johnson v. Wal-Mart Stores, Inc., No. 95-C-1176(H) (N.D. Okla. 1995) (same); Maxon v. Texaco Ref. & Marketing Inc., 905 F. Supp. 976 (N.D. Okla. 1995) (Holmes, J.) (same) .

In the instant case, neither the allegations in the petition nor the allegations in the removal documents establish the requisite jurisdictional amount. Thus, on its face, the petition does not establish that the amount in controversy is greater than \$75,000.00.


Where the face of the complaint does not affirmatively establish the requisite amount in controversy, the plain language of Laughlin requires a removing defendant to set forth, in the removal documents, not only the defendant's good faith belief that the amount in controversy exceeds \$75,000, but also facts underlying defendant's assertion. In other words, a removing defendant must set forth specific facts which form the basis of its belief that there is more than \$75,000 at issue in the case. The removing defendant bears the burden of establishing federal court jurisdiction at the time of removal, and not by supplemental submission. Laughlin, 50 F.3d at 873. See Herber, 886 F. Supp. at 20 (holding that the jurisdictional allegation is determined as of the time of the filing of the Notice of Removal). And the Tenth Circuit has clearly stated what is required to satisfy that burden.

As set out in Johnson v. Wal-Mart Stores, Inc., No. 95-C-1176(H) (N.D. Okla. 1995), if the face of the petition does not affirmatively establish that the amount in controversy exceeds \$75,000.00, then the rationale of Laughlin contemplates that the removing party will undertake to

perform an economic analysis of the alleged damages with underlying facts. Defendant in this case has failed to establish the federal jurisdictional amount of \$75,000 at the time of removal and, for this reason, this case must be remanded to the District Court of Tulsa County. The Court hereby orders the Court Clerk to remand the case to the District Court of Tulsa County.

IT IS SO ORDERED.

This 30TH day of September, 1997.


Sven Erik Holmes
United States District Judge